TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 134.

THE SKANEATELES WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, AS PRESIDENT OF SAID VILLAGE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 18, 1900.

(17,870.)

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a Court of Appeals, State of New York.

THE SKANEATELES WATER WORKS CO., Appellant,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustee- of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Respondents.

Case and Exceptions.

George Barrow, attorney for appellant.
Charles A. Hawley, of counsel.
M. F. Dillon, attorney for respondents.
Wm. G. Tracy, of counsel.

1 Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

Case and Exceptions.

Statement.

2 The above-entitled action was begun by the service of the summons and complaint Oct. 29, 1896; and the answer therein was served on or about Nov. 20, 1896.

There has been no change of parties.

The action was referred to Hon. John W. Hogan of Syracuse as sole referee, to hear, try and determine. The hearings before the referee began Dec. 29, 1896, and were continued from time to time, the oath of the referee having been waived in open court.

The following case contains all of the evidence and other proceedings upon the trial of the action material to the questions to be raised.

Upon the trial before the referee, Mr. Barrow, for the plaintiff, offered in evidence a certificate signed by the authorities of the village of Skaneateles pursuant to chapter 213 of the Laws of 1881, dated July 5, 1887, filed in the clerk's office of Onondaga county July 12, 1887, which is hereto annexed marked Ex. 1.

He then offered in evidence a certified copy of the certificate of organization of the Skaneateles Water Works Company filed in the office of the secretary of state, August 1, 1887, which is hereto annexed, marked Ex. 2.

Thereupon the plaintiff called as a witness **Warren B. De Witt**, who being duly sworn, testified as follows:

3 I am the clerk of the village of Skaneateles, and have custody of its records, and have them with me. I have a contract made between the Skaneateles Water Works Company and the village of Skaneateles.

Being shown the records of said village at page 529, a resolution there appearing adopted at a meeting April 20, 1889, was offered and received in evidence, and is as follows:

"Resolution, That the proposed contract as agreed upon by the committee appointed by this board and the committee appointed by the Skaneateles Water Works Company, be and the same is hereby accepted and adopted and the committee discharged, and the president of this board be, and he is hereby authorized and directed to execute the same for and in behalf of the said trustees of the village of Skaneateles and affix the corporate seal of said village. Carried. Ayes—Barrow, Kelly, Sheppard."

At that time I think there were three trustees and a president. Milford, president; Barrow, Sheppard and Kelley, trustees.

The contract referred to between the village of Skaneateles and the Skaneateles Water Works Company was received and is hereto annexed marked Ex. 3.

The witness was shown volume A of the Records of the Village of Skaneateles, page 569, under date of Sept. 14, 1889, and testified that that was the village records. Thereupon the following from such record was offered and received in evidence:

4 "At a special meeting of the trustees of the village of Skaneateles, held at the fireman's room at the call of the president, the following officers were present: T. Kelley, Sheppard, J. D. Barrow, trustees. On motion of Mr. Sheppard, seconded by Mr. Kelley, Mr. Barrow was appointed clerk of the meeting in place of Mr. Benedict absent. Mr. George Barrow, president of the Skaneateles water works, appeared before the board on behalf of said company and made an application for a renewal of the franchise of said company, and thereupon Thomas Kelley offered the following preamble and resolution and moved its adoption, viz:

Whereas, on the 5th day of July, 1887, the corporation of the village of Skaneateles, N. Y., granted to John E. Waller and others of Skaneateles, N. Y., a franchise and contract to operate in the village of Skaneateles a system of water works for supplying said village and its inhabitants with water, it being provided and such franchise was granted on condition that the company to be formed by John E. Waller and others should have its works in general operation in said village within two years from Dec. 1, 1887; and

Whereas, the proposed company having been formed has failed to complete its works as aforesaid;

Now therefore, the said company having applied for a renewal
and extension of said franchise and term, resolved that said fran-
chise as recorded in the village record be and the same is
5 hereby renewed, and the term of the completion of the work
is hereby extended until Dec. 1, 1890, on condition that said

franchise shall be void if said company shall not have completed its work within one year from Dec. 1, 1889; it being understood that the contract made by said village with said company shall continue to be binding upon said company, and this franchise is renewed upon that condition.

The resolution was thereupon adopted on motion of Mr. Kelley, seconded by Mr. Sheppard.

The meeting then adjourned *sine die.*

J. D. BARROW, *Clerk pro Tem.*"

Plaintiff then offered in evidence from the same record page 666, dated Feb. 21, 1891, the following entry, which was received:

"Notice having been given and the practical test specified in the contract dated April 23, 1889, having been made, on motion of E. D. Wheaton, seconded by Thomas Kelley, resolved that the forty hydrants of the Skaneateles Water Company be accepted according to the terms and conditions of said contract, to begin with Feb. 1, 1891. Carried; ayes, Kelley, Sheppard, Wheaton.

S. E. BENEDICT, *Clerk.*"

Plaintiff then offered in evidence a mortgage given by the Skaneateles Water Works Company dated August 22, 1890, to secure the
payment of forty thousand dollars' worth of bonds of the com-
6 pany and recorded Sept. 9, 1890, in Book of Mortgages 259 at
page 183. The same was received and is hereto annexed
and marked Ex. 3½.

The plaintiff then offered in evidence another mortgage dated Feb. 1, 1895, made by Skaneateles Water Works Company to Delaware County Trust, Safe Deposit and Title Insurance Company of Chester, Pa., as trustee, to secure the payment of $10,000 worth of bonds, recorded in the clerk's office of Onondaga county in Book 287 of Mortgages page 455, Feb. 5, 1895; which was received and is hereto annexed marked Ex. 4.

The witness continued: I am a resident of the village of Skaneateles; have lived in the village about 14 years and am 30 years of age; have been clerk of the village since March, 1896. My immediate predecessor was S. E. Benedict. I have the records of the village during the time I have acted as clerk here. I wasn't clerk when a meeting of the board of trustees of the village of Skaneateles was held for the purpose of appointing a water commission. I hadn't taken office at that time. I can find the record of that meeting.

Plaintiff offered the record of that meeting in evidence which was received and read as follows:

"SKANEATELES, N. Y., *March* 21, 1896.

Special meeting called by the president met at the office of E. Norman Leslie for the purpose of appointing water commissioners for the village of Skaneateles and such other business as may come

7 before the meeting. Present: E. Norman Leslie, president; John Connell, Edwin Whiting and Edward Dent, trustees.

On motion of John Connell, seconded by Edwin Whiting, resolved that the president be and he hereby is authorized to appoint the following-named persons as water commissioners of the village of Skaneateles, N. Y.: Lemuel D. Hall, James A. Root, Edward Eckett, John L. Shultz. Carried; ayes; Connell, Whiting, Dent.

The president appointed the following-named persons as water commissioners for the village of Skaneateles; Lemuel D. Hall, James A. Root, Edward Eckett and John L. Shultz.

On motion of Edwin Whiting, seconded by John Connell, resolved, that the above appointments made by the president, as follows: Lemuel D. Hall, James A. Root, Edward Eckett and John L. Shultz as water commissioners be and the same is hereby confirmed. Carried: Ayes; Connell, Whiting, Dent."

Plaintiff then read in evidence from the minutes of the board of trustees of a meeting held April 23, 1896, on page 366, the following:

"To the trustees of the village of Skaneateles.

GENTLEMEN: We, the board of water commissioners of Skaneateles village, having organized by the election of a president, secretary and treasurer, would respectfully request your honorable body to issue a call for a special election to determine the question of bonding the said village to furnish a supply of pure and wholesome water for said village pursuant to chapter 181 of the Laws of 1875. 8

Yours respectfully,

LEMUEL D. HALL, *President.*
JOHN L. SHULTZ, *Secretary.*"

"On motion of Edwin Whiting, seconded by Edward Dent, resolved, that the clerk in conformity with the call of the board of water commissioners be directed to issue a call for a special election to be held in the trustees' room in the engine-house in the village of Skaneateles on the 9th day of May, 1896, from one o'clock until sundown of that day to determine the question whether the village of Skaneateles shall bond itself for the purpose of supplying said village with a supply of pure and wholesome water to the amount of $30,000 as provided by chapter 181 of the Laws of 1875. Carried. Ayes; Connell, Dent and Whiting."

It appears that all the trustees were present; three trustees and the president.

"On motion of Edwin Whiting, seconded by Edward Dent, resolved, that the clerk be authorized to have the following notice published in the Skaneateles Free Press for two weeks:

Special Election Notice.

We, the undersigned, board of trustees of the village of Skaneateles, county of Onondaga, N. Y. hereby give notice that a special
election will be held in the trustees' room in the engine-house
9 in the village of Skaneateles, N. Y., on Tuesday, May 9, 1896,
at which the question will be submitted whether a tax under the act chapter 181, Laws of 1875, authorized for the purpose of furnishing pure and wholesome water to the inhabitants of said village shall be levied and collected from the village as in that act provided, and whether the village of Skaneateles shall bond itself for the above-mentioned purpose to the amount of $30,000. The vote shall be by ballot; those in favor of taxes shall have printed thereon 'For the water tax' and the ballots of those opposed 'Against the water tax.' The polls of election will be open at one o'clock in the afternoon and continue open until sundown on the ninth day of May, 1896.

E. NORMAN LESLIE, *President.*
JOHN CONNELL,
EDWIN WHITING,
EDWARD DENT, *Trustees.*

Carried. Ayes; Connell, Dent and Whiting."

The witness continued: Subsequent to that I caused a notice to be published in the Skaneateles Free Press, and have a copy of that notice as I published it.

The notice was offered in evidence.

It corresponds precisely with the foregoing notice directed by the trustees except that in the heading thereof the word "notice" is omitted, and the heading of the published notice is "Special election."

10 I think I published that notice. They authorized me by the resolution to publish the notice, which is the resolution which has just been read and I made the publication in pursuance of that resolution of April 23. I also have the record of the proceedings of the special election referred to in the notice.

The plaintiff offered and there was received in evidence the record of May 9, 1896, which was as follows:

"SKANEATELES, N. Y., *May* 9, 1896.

The following officers met at the engine-house at one o'clock p. m. of the above date and received the votes as per resolution of April 23, 1896, as follows:

Resolved, That the clerk in conformity with the request of the water commissioners be directed to issue a call for a special election to be held in the trustees' room in the engine-house in the village of Skaneateles on the 9th day of May, 1896, from one o'clock until sundown of that day, to determine the question whether the village of Skaneateles shall bond itself for the purpose of supplying said village with a supply of pure and wholesome water, to the amount of $30,000, as provided by chapter 181 of the Laws of 1875.

Carried. Ayes; Connell, Dent, Whiting."

I was present at that meeting as clerk, and acted as clerk; votes were received upon that occasion. I was present during the entire
afternoon. After the balloting was done the vote was an-
11 nounced. The record is: The whole number of votes cast
was 146; for the water taxes 181, against the water taxes 27; defective ballot 1, ballots returned not voted 1.

The defendant here read in evidence from the same record the following:

"On motion of John Connell, seconded by E. Whiting, that Edward Dent be appointed chairman of the board of inspectors of election. Carried; ayes, Connell and Whiting.

On motion of John Connell, seconded by E. Whiting, that John Connell be appointed inspector to receive ballots.

Carried, ayes; Connell, Dent and Whiting.

On motion of John Connell, seconded by E. Dent, that Whiting and W. B. De Witt be appointed ballot clerks. Carried, ayes; Connell and Dent."

I have now read the entire record of that meeting except the certificate of the board, which was as follows:

STATE OF NEW YORK, }
Onondaga County, } *ss:*

John Connell, Edwin Whiting, Edward Dent and Warren B. De Witt, being duly and severally sworn, each for himself says: The said Edward Dent, that he was chairman; the said John Connell, Edwin Whiting and Warren B. De Witt, that they were inspectors
of election at an election held in and for the village of Skane-
12 ateles, N. Y., on the 9th day of May, 1896, and that the fore-
going statement of the result of said election is true to the best of his knowledge and belief.

WARREN B. DE WITT,
JOHN CONNELL,
EDWIN WHITING,
EDWARD DENT,
Inspectors of Election.

Severally subscribed and sworn to before me this 9th day of May, 1896.

M. F. DILLON,
Justice of the Peace.

HENRY C. HOWARD, being called by the plaintiff and sworn, testified as follows:

I reside in Medina, Delaware county, Pa. I am managing a trust company at present, am a lawyer by training. I am connected with the Delaware County Trust, Safe Deposit & Title Insurance Company of Chester, Pa., and am president of the corporation. I think in one of the mortgages given by the Skaneateles Water Works Company we were substituted trustees in the place of some New York company, and are now the trustees named in both of these mortgages. We have been paying every six months the interest upon 40,000 first-mortgage bonds and 10,000 of second-mortgage bonds; and the money has been supplied to us as far as we know, by the Skaneateles Water Works Company or the obligor of the bonds. None of the principal of these bonds has been paid that I am aware of.

13 Upon cross-examination, he testified:

We purchased $20,000 of these bonds. I think it was $20,000 of the first issue, under the first mortgage. I think we paid 97½. I am not sure. I really don't know who took the other $20,000 of the bonds. We didn't sell them to somebody. They had been sold before we had anything to do with it; some New York trust company was originally trustee and handled the bonds. We didn't buy any of the second-mortgage bonds. They were sold, I think, through us. We sold them for the Skaneateles Water Company, I suppose. Mr. Hawley may have dealt with us, likely he did as representing the company; I think he is an officer of the company. I am not sure but what we guaranteed the payment of these bonds to a limited extent; probably a few thousand of them. We didn't guarantee the payment of the whole $40,000. It didn't guarantee the payment of $20,000. My impression is that we did guarantee in some individual cases some of the bonds to our customers where it was required. I could not tell you how many without examining our books.

I know Mr. Hawley, the president of this company; he lives in the same town I do. He is a banker; he is president of the First National Bank of Medina now. Yes, another bank in Medina. I don't think he suggested our taking those bonds originally.

14 I think the offer came to us through the American Pipe Manufacturing Company of Philadelphia. I visited Skaneateles at the direction of our board and Mr. Hawley came with me on that occasion as I was a stranger in this part of the world. I think Mr. Hawley is not the president of this pipe manufacturing company; he is a director, but whether he has any other office or not I am not able to say. I really don't know. I expect I knew that he was president of the Skaneateles Water Company at the time by looking at the papers. His name was on the bonds, so if his name was on the bonds I knew he was president and I suppose he had an interest in our buying the bonds of the pipe company. I am not a relation of Mr. Hawley. I think they were sold at 85. We were asked to bid on them, but we didn't bid. I think they had a bid at 85; that is what I understood they were sold at. The best I could do would be to say that they were sold either in the spring or summer of 1895. I think they were sold soon after this mortgage was created and that was 1895. Hawley is not a director in our bank, and I am not a director in his bank. He is not even a stockholder in our bank, nor I in his. I did not learn what the pipe company paid for these bonds. I understood that they came

into the possession of them by virtue of their being a construction company. That they didn't pay the money, but the consideration was work or material furnished. That was our understanding
15 of the way they got their bonds. That was our understanding
at the time. So understand in all cases, that they get those bonds in consideration of construction. I understand they give value received of course, but not a loan of money advanced. They are constructors of water works and take bonds in payment. Mr. Hawley's full name is Joseph W. Hawley.

Warren B. De Witt, being recalled and examined by plaintiff's counsel, further testified as follows:

I stated that I was present during the election which was held on the 9th of May and acted as poll clerk. The poll clerk takes down the names of the voters as I think that is what I did. I took down the names of all the voters that voted, I think. I don't think there was any votes received of persons residents of the village of Skaneateles who were not tax-payers of the village; none received unless they were tax-payers as I understand it.

Q. During the time you were present was there any votes offered by a resident of the village who was not a tax-payer to your knowledge?

A. Well, to answer that conditionally there was one offered; it was John E. Haywood who offered to vote. I know him personally; he is a resident of the village, was at that time. I should say he was a voter. The last annual election held in the village
16 of Skaneateles of trustees was some time in March. I don't
know exactly what day. (Mr. Dillon, attorney for defendants, says the 17th.) I suppose the next annual election will be a year from that date in March. I don't know just what day.

It is conceded that the village was organized under the general village law; and that the annual election of the village is held on the third Tuesday in March.

The Witness (after examining the record): It was the 17th last year. The persons who were appointed as appears by the record to be water commissioners of the village I think took and filed an oath of office. I think I have it with me.

Witness produces them.

They were offered and received in evidence, marked Ex. 7, Ex. 8, Ex. 9, inclusive, and one of them reads as follows:

"I do solemnly swear or affirm that I will support the Constitution of the United States and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of water commissioner of the village of Skaneateles according to the best of my ability, and I do further solemnly swear or affirm that I had not directly or indirectly paid, offered or promised to pay, contribute or offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or with-

holding of votes at the election at which I was appointed to
17 said office, and have not made any promise to influence the
giving or withholding of any such vote.

(Signed) JAMES A. ROOT.

Sworn to before me this 22d day of March, 1896.

M. F. DILLON,
Justice of the Peace."

(The affidavits of the other commissioners were in the same form.)

I have been acting as clerk of the water commissioners. The water commissioners have entered into a contract for the construction of water works in the village of Skaneateles. I have that contract with me.

The contract is offered in evidence; received and marked Ex. 10, and is hereto annexed.

Since the execution and filing of that contract a change has been made in it. I have it in writing. I haven't got that one here. It was a small contract that the engineer had with him in his pocket. I didn't think of that. We had it on file and he has taken it, the engineer had it. The engineer got it I guess. You might say that it isn't in shape to file yet. There has been no other contract executed between these water commissioners and anybody for the construction of water works to my knowledge. I don't think
18 there is a verbal contract existing. This is the only contract
that exists that I know of in regard to the construction of water works in the village of Skaneateles, and is the only one that I have on file in the office of the clerk of the village. A part of the work has been done under that contract. I should imagine something like a third of the work, some pipe has been laid. I don't think I can tell you the date that they commenced to lay pipe. I think the date they commenced to work under this contract and perform work was about the 22nd day of October. I am not positive to a day, that is my memory. And since then considerable pipe has been laid and a reservoir constructed. That is the principal work that has been done so far, except there has been work on the well. They have been working at the well I should think it must be five weeks or six weeks perhaps. I suppose under the same contract. This contract was made with John Marsden.

Q. Is he constructing the well under this contract?

A. Everything is charged to Mr. Marsden and Mr. Marsden pays the bills. No contracts have been let for any construction except the contract referred to which is not in evidence. The bonds of the village for the purpose of raising money to pay for the construction of the water-works system have been sold. Thirty of $1,000 each. They were sold by the water commissioners.

19 in referred to was held on Jan. 29, 1896, the record of which
is as follows:

"Skaneateles, N. Y., January 29th, 1896.—The following officers met in the engine-house at 10 o'clock a. m. on the above date to receive the votes as per resolution of Jan. 15, 1896, as follows: Resolved, That the trustees of the village of Skaneateles be and are hereby advised to enter into or not to *t*enter into

I knew of the construction of the works of the Skaneateles Water Work- Company. That is the company that is existing there now. And I am aware of the fact as a resident of that village that since 1890, or about then, that company has been furnishing water for the citizens of that village. I know where that company derives its water, from what source. It is from Skaneateles lake. I was aware of the existence of the contract. It has been put in evidence here, between the village and the water works company. I think it expired Feb. 1, 1896. After that contract expired I think there was some correspondence passed between the company and the village. That contract was not renewed as I know of. Since Feb. 1, the village has had no contract with the Skaneateles Water Works Company. There was a meeting called by the trustees of the village at which the people of the village voted upon the subject whether they would or would not renew a contract with the Skaneateles Water Works Company. I think there is a record of that meeting
20 and the call, Jan. 29, 1896. I find the election. I find the call and resolution Jan. 15, as follows:

"On motion of John Connell, seconded by Edwin Whiting, Resolved, That a special election shall be held in and for the village of Skaneateles by the qualified voters thereof in the engine-house in said village, on Wednesday, January 29, 1896, from 10 o'clock a. m. until sunset, on said 29th day of January, 1896, to vote on the following proposition, to wit:

'Resolved, That the trustees of the village of Skaneateles be and are hereby advised to enter into or not to enter into a contract with the Skaneateles Water Works Company for the use of forty hydrants for fire or other municipal purposes, for the term of five years, at the annual rate of fifty dollars per hydrant, or $2,000 per year.'

The above resolution being of an informal character is taken under the act of 1887, conferring additional powers upon villages for the purpose of carrying out some other proper village object.

The ballots of such special election shall have the following words thereon, to wit: 'For such contract,' 'Against such contract.'

Carried. Ayes: E. Norman Leslie, president; John Connell, Edwin Whiting and Frank Adams, trustees."

In pursuance of that it appears the meeting there-

21 a contract with the Skaneateles Water Works Company for the use of forty hydrants for fire or other municipal purposes, for the term of five years, at the annual rate of fifty dollars per hydrant, or $2,000 per year."

Present John Connell, Edwin Whiting, and Frank Adams, trustees.

"On motion of John Connell, seconded by Edwin Whiting, that

Frank Adams be appointed chairman of the board of inspectors. Carried; Ayes: Connell, Whiting and Adams.

"On motion of Edwin Whiting, seconded by Frank Adams, that John Connell and S. E. Benedict be appointed inspectors to receive ballots. Carried: Ayes; Adams, Whiting and Connell.

"On motion of John Connell, seconded by Edwin Whiting, that Frank Adams and Edwin Whiting be appointed ballot clerks. Carried: Ayes; Adams, Whiting and Connell."

The election resulted as follows: the total number of votes cast was 115: for such contract 11; against such contract 98; defective ballots 6. Against such contract carried.

Prior to this I believe there had been some communication received from Skaneateles Water Works Company a letter. I have some of those letters. I don't know that I have everything. The date of the first letter that I have, I think is Jan. 2. It is from J. W. Hawley, president of the Skaneateles Water Works
22 Company. I don't know whether this is the first letter we ever had or not, but it is the first I have here.

Letter offered in evidence by plaintiff; received and marked Ex. 11, and reads as follows:

MEDIA, PA., *January 2nd*, 1896.

To the board of trustees of the village of Skaneateles.

GENTLEMEN: The contract of the Skaneateles Water Works Company with the village of Skaneateles will expire on the first day of February, 1896, and we are compelled to inform you that we cannot renew this contract at the old rate. The present rate is thirty dollars per hydrant. The rate for renewal will be fifty dollars per hydrant.

"We have been greatly disappointed in the number of takers in your village. This and the limited quantity of water taken by many of those who became takers renders it necessary that our rate should be increased. We had hoped to have made the plant self-sustaining without this increase, but it seems that your people, either because of lack of sewerage system or for some other reason do not appreciate a water system. In increasing the hydrant rate to fifty dollars we are still below the rental charged in other places. In some places the rent is one hundred dollars per hydrant, and we do not think you will find any village in your State paying less than sixty for a pumping plant producing the head of water furnished by this company. Since we
23 began operations five years ago we have been obliged every year to make up a large deficiency. We do not care to continue operating the plant in that way, preferring to discontinue it. The increase now proposed both to general consumers and to the village will still be insufficient to make up the deficiency, but it will not be so large that we will be unwilling to incur the risk of another five years' contract, and if at the end of that time the income shall warrant a reduction, we promise to make it. In the event that a new contract shall not be completed with you prior to the expiration of the present one, it must be understood that the old one shall

have ceased at the expiration of the present term. If the village shall decide not to take the water on the terms proposed, notice will be given of the date when the hydrants will be closed.

Yours truly,

SKANEATELES WATER WORKS CO.,
By J. W. HAWLEY, *President.*"

Another letter was offered and received in evidence, marked Ex. 12, and is as follows:

"MEDIA, PA., *January* 31, 1896.

"E. Norman Leslie, pres't board of trustees Skaneateles village.

"MY DEAR SIR: I have a copy of the resolution passed by your board Jan. 29, signed by S. E. Benedict clerk, which states 24 that the board of trustees declines to enter into another contract for water for fire protection of your village.

"This puts me, as the president of Skaneateles Water Co. in a very delicate position. As the present contract ends Feb. 1, 1896, and a refusal to renew it at any price would leave the town without any protection in case of fire, and the question of damages for nonuse of hydrants would place a heavy loss on some one, and as the president of the water company I most earnestly object to being held responsible in any way.

"Very respectfully,

"THE SKANEATELES WATER CO.,
"Per J. W. HAWLEY, *Pres't.*"

Another dated Feb. 1, 1896, received in evidence and marked Ex. 13, which was as follows:

"MEDIA, PA., *February 1st*, 1896.

"To the board of trustees of the village of Skaneateles, New York.

"GENTLEMEN: We are in receipt through Mr. Burton of a notice to the effect that you have adopted a resolution refusing the terms offered you for hydrant rentals, on the ground that it is the sense of your tax-payers that they are in favor of municipal ownership.

"While the information received from private sources does not show that the tax-payers have voted upon the subject of municipal ownership, but solely upon the question whether they would accept a new contract for hydrant rentals on the terms offered by 25 us, and while upon this question it appears that only 109 votes were received out of perhaps four hundred (400) competent voters, showing that possibly three hundred of your tax-payers are indifferent; we think the resolution adopted by your board must be considered as conclusive of your own views.

"We therefore give you notice, in pursuance of our former communication, that the hydrants will all be closed on the fifteenth (15th) day of February, 1896. We give you this fifteen days' notice that you may be enabled to provide your village with other fire protection before the hydrants are closed.

"Yours respectfully,

"THE SKANEATELES WATER WORKS CO.,
"By J. W. HAWLEY, *President.*"

Another dated Feb. 7, 1896, was received in evidence marked Ex. 14, and is as follows:

MEDIA, PA., *Feb. 7th*, 1896.

"E. Norman Leslie, Esq., pres'd't board of trustees, Skaneateles village.

"DEAR SIR: I have your letter of Feb. 5th, suggesting a continuance of the former contract for hydrant rental for your village for one year.

"In my communication of January I plainly set forth that the proposed increase was not that the water company should be enabled to pay a dividend to its stockholders—but simply to enable it to pay the expense of running the plant, and that the proposed
26 increase would be taken off as soon as the company can afford to do so.

"Now, I don't think we should be asked to pay out of our personal funds to put the residents of Skaneateles out of danger of fire and to reduce their payment to insurance companies.

"The stockholders have not received any benefit whatever from the plant. The inhabitants of Skaneateles have received everything.

"I do not think we ask anything unreasonable. This town of 3,000 inhabitants pays for private use over $8,000, and could your people be induced to take the water it would soon make it possible to reduce the charge to the village.

"Since writing the above I have received a copy of the Democrat, containing your communication, and reading it carefully with your letter it looks as if the object of the village was to obtain protection from us while they had time to construct opposition works as the people of Canandaigua did. I hope I am wrong in this conclusion, for the feeling of the company towards the village is of the kindest, and we only ask for help during the emergency.

"I did not understand that none but tax-payers were permitted to vote at the election of Jan. 29, and if that was the case, as you state in your letter, the ladies should have been allowed to vote, and I think the eighty votes of the ladies would have been voted for protection from fire.

27 "Hoping your may see your way clear to assist us out of the difficulty in a more substantial manner, I am

"Respectfully yours, J. W. HAWLEY."

A letter from Mr. Leslie to Mr. Hawley dated Feb. 13, 1896, was received in evidence marked Ex. 15, and is as follows:

"SKANEATELES, *February 13th*, 1896.

"J. W. Hawley, Esq.

"DEAR SIR: Your letter of the 7th inst. was duly received and contents noted. Since its receipt I have had the correspondence published in the Democrat here.

"As president, I have been authorized to correspond with you to ascertain, if possible, the minimum terms by which your plant here can be purchased by the village. But since the vote of authorization was passed I have inspected the annual reports of the Skaneateles Water Works Co. at the county clerk's office. The first was filed with the secretary of state, Jan. 26, 1892; the next one filed Dec. 17, 1894; and the third and last one, July 22nd, 1895. According to these statements it would appear that your plant has been mortgaged for $50,000, and, further, that you have issued $40,000 in paid-up stock, thus making in all $90,000.

" This being the case, it seems to me to be unnecessary for me to continue this correspondence for the purpose designated, as
28 your investment here, as per your reports, is entirely beyond any consideration by the authorities of this village.

" Very respectfully, E. NORMAN LESLIE,
"*President of the Village.*"

A letter from Mr. Hawley to Mr. Leslie, dated Feb. 17, was received in evidence, marked Ex. 16, and is as follows:

MEDIA, *Feb. 17th*, 1896.

E. Norman Leslie, Esq.

PRESIDENT: I am not aware under what parliamentary rule your honorable body operates, but I understand that if a corporate body instructs a president to perform certain acts it is his duty to do so, regardless of his own " presumption."

" You say that you were authorized to correspond with the Skaneateles Water Company in relation to the purchase of the plant, but in the same letter say you presume it is unnecessary to continue the correspondence.

" If you seriously object to asking the stockholders of the Skaneateles Water Company at what rate they will part with their holdings, we will be happy to correspond with any other member of your honorable body they may select.

" Very respectfully, J. W. HAWLEY."

A reply to the above dated Feb 20, 1896, was received in evidence, marked Ex. 17, and is as follows:

29 " SKANEATELES, *February* 20, 1896.

" J. W. Hawley, Esq.

" DEAR SIR: I have your favor of the 17th inst. and note contents. Our parliamentary law is governed by the usual practice of the organization a sort of 'go-as-you-please plan,' but we will not discuss that subject farther, but come at once to the main question. As president I was only authorized to correspond with yourself as president of the Skaneateles Water Works Company, not to the company or to the stockholders, but to yourself.

" Now, will you please state to the authorities of the village of Skaneateles your very lowest terms by which you will dispose of your plant and franchise in this village, free of all mortgages or other incumbrances? The stockholders, if asked, might place a price on their interest, at the same time might intimate that the plant was subject to the bonds which had been issued by the loan & trust company, to whom the plant had been mortgaged. What is wanted is a price free from all incumbrances of any description. Now this is a plain and distinct question, and as soon as your reply is received it will be submitted to the authorities of the village.

"Very respectfully, E. NORMAN LESLIE,
"President of the Village."

A letter to the president and trustees of the village of Skaneateles from Mr. Hawley was received in evidence, marked Ex. 18, and is as follows:

30 "MEDIA, PA., *Feb. 24th*, 1896.

"To the president and trustees of the village of Skaneateles:

"With very much regret, and solely for the purpose of protecting the interests of the Skaneateles Water Works Company, and after consultation with the stockholders, and with their approval and by their direction, I give you formal notice that the hydrants in your village, forty in number, have been closed.

"We give this notice because we wish it clearly understood that if an isolated fire should occur, or if an extensive conflagration should be threatened, there must be no interference with the hydrants; not that we think there would be, but because we have heard it suggested that the village can refuse to enter into a contract for hydrant rentals, and then in the event of a conflagration expect the water company to furnish water with which to extinguish it; while there are some in every community who would expect to forcibly open the hydrants in such an event. We wish it understood that the works of the company, whether closed or open, are under your protection. We require that they be protected as closed, and in event that they shall be opened by you as a justifiable procedure in the face of great danger, or under your sanction, or by any other person with or without responsibility, for the purpose
of extinguishing fires, we shall make a charge against you
31 in each instance of two thousand dollars, as the reasonable
value of the service which may be rendered.

"We would say, however, that we have directed Mr. Burton to reduce the pressure on the pipes, as the water is not needed for fire protection, and nothing in the foregoing shall obligate the company in any event to resume the former pressure, or keep the pipes supplied in event of fire.

"Very respectfully,
"THE SKEANEATELES WATER WORKS COMPANY,
"By J. W. HAWLEY, *President.*"

A letter from Mr. Hawley to Warren B. De Witt, secretary, dated April 6, 1896, was offered and received in evidence, marked Ex. 19, and is as follows:

"MEDIA, PA., *April* 6, 1896.

Warren B. De Witt, secretary.

DEAR SIR: I have your letter of April 2, asking if I desire to sell the water plant in your village and when the same could be delivered free of incumbrance. There seems to be a misunderstanding of my ownership of the Skaneateles water works by the trustees of the village of Skaneateles, and for your information I will give you a history. These water works were built for the Skaneateles Water Works Company partly by a company in New York city, who were unable to complete the same, which was done by the American Pipe Manufacturing Company of Philadelphia, who held the stock issued.

The bonded debt was $40,000, which was spent entirely on
32 the works and was not sufficient to complete the work. I
purchased of the American Pipe Company $20,000 stock of the company, and afterwards $10,000 of Mr. Hall of Skaneateles. The operating expenses with the interest on debt exceeded the income, so that in 1894 the stock was increased to $50,000 and the debt to $50,000, the extra $10,000 being used to take up the floating debt, being money borrowed to operate the plant and pay interest. These bonds are held by holders for full value, many of them women, some in New York State, the balance in Philadelphia and vicinity. The interest in the company which I control and have for sale is $33,000 of the capital stock, which, of course, is a controlling interest in the works. As I stand behind the bonds issued and purchased by the holders in good faith, I cannot sell this stock without an agreement that the principal and interest of these bonds should be provided for. You can, therefore, see that what I have to sell is $33,000 of stock of the company, which I bought at a reduced price, hoping that the increased consumption of water in the village would make it profitable. I therefore make the following offer for you to present to your board: I will leave to the four men appointed by the village of Skaneateles as the Skaneateles water board to fix the price the village can afford to pay me for the $33,000 of stock, subject to an agreement that the village will honestly protect and pay principal and interest of the bondholders for their bonds when due. Whatever price they say is a fair and equitable settlement for the
33 same I hereby agree to accept, placing full confidence in their
desire to do what is right for the village and myself. I therefore leave the matter entirely in your hands, which I think is as liberal as I can afford.

Respectfully yours, J. W. HAWLEY."

A letter to the board of trustees of the village from Mr. Hawley dated May 27, was offered and received in evidence and marked Ex. 20, and is as follows:

"MEDIA, PA., *May* 27, 1896.

"To the board of trustees of Skaneateles village, N. Y.

"GENTLEMEN: Mr. George Barrow, as attorney for the Skaneateles Water Works Company, was authorized to make a proposition to the village authorities, that in case condemnation proceedings were entered into by the village the water company would bear certain part of the costs, but in view of further consideration and non-acceptance of the proposition, so much of the offer is now withdrawn.

"When this company asked of the village an increase for hydrant rentals to fifty dollars per annum we were not aware of the fact that the franchise limited us to forty dollars, and as there was no intention on our part to violate the terms of the franchise, we withdraw that proposition.

"The offer made by Mr. Barrow, the attorney for the company, to furnish the village with fire protection at forty dollars per 34 hydrant per annum for five years, then for five, ten, or fifteen years at thirty dollars per hydrant per annum, is renewed and awaits your early consideration.

"In a former communication I advised you that if in case of fire the hydrants should be used by the village, that the village should be held responsible, and that for any such use would be charged two thousand dollars.

"This I now recall, and insert in its place, that if in case of fire the village should use the hydrants they should be charged such sum as shall be judged just and reasonable.

"Respectfully, J. W. HAWLEY,
"*President of Skaneateles Water Works Co.*"

I have no other letters from Mr. Hawley, or written to him, that I know of. I think I have an offer that Mr. Barrow filed with the board which is referred to in this letter. The document you show me was handed to me by you (Mr. Barrow) upon the 6th day of May at the time of voting I think in the afternoon. There was a public meeting held in Skaneateles on the night preceding, I attended. I filed that communication in the office of the clerk of the village the next day I think.

The communication was offered and received in evidence, marked Ex. 21, and is as follows:

"SKANEATELES, *May 9th*, 1896.

"To the people of the village of Skaneateles:

35 "In view of the present controversy existing between the president and trustees of the village of Skaneateles and the Skaneateles Water Works Company, and with the view of avoiding litigations and rivalries, which would necessarily be injurious to both, and in the interest of fair dealing and justice, I, being duly authorized, do make to the people of the village of Skaneateles the following propositions:

"First. That the Skaneateles Water Works Company will enter into a contract with the village to rent its hydrants at the sum of $40 each, per annum, for the next five years, and from and after the expiration of the said five years, for the sum of $30 each annually, for a term of five, ten, fifteen, twenty, or thirty years.

"Second. Or, the said Skaneateles Water Works Company will consent to condemnation proceedings waiving all irregularities, if any, in proceedings thus far taken for the acquisition of its property, rights, and franchises by the village under the provisions of section 22 of chapter 181 of the Laws of 1875, and any act amendatory thereof or in substitution of the same, authorizing such proceedings.

"(Signed) GEORGE BARROW.

"Objection having been made to such condemnation proceedings
on behalf of the village on account of the expense thereof, it
36 is further agreed by said water company that if such proceed-
ings shall be brought the said Skaneateles Water Works Com-
pany will upon the demand of the village pay all the expenses of
such commission, excepting counsel fees.

"GEORGE BARROW."

After the appointment of the water commissioners as shown by the record those commissioners filed bonds in my office and in the office of county clerk.

Being cross-examined, the witness testified:

I find on file an appointment of the water commissioners which is now shown me: That is the signature of E. Norman Leslie, the president of the village. It is endorsed, "Filed March 21, 1896, Warren B. De Witt, clerk."

The defendant offered the paper in evidence. It was received, marked Ex. 23, and is as follows:

"VILLAGE OF SKANEATELES, *ss:*

Whereas the board of trustees of the village of Skaneateles have
authorized me, the president of said village of Skaneateles, to appoint
water commissioners for the said village, now, therefore, I, the un-
dersigned, the said president of said village of Skaneateles, do hereby
appoint Edward Eckett, John L. Schultz, Lemuel D. Hall,
37 and James A. Root water commissioners of the village of
Skaneateles.

E. NORMAN LESLIE,
President of the Village of Skaneateles.

Dated March 21st, 1896."

The plaintiff then offered in evidence the extension of the franchise of the plaintiff heretofore read from the records of the village of Dec. 14, 1889, containing also the consent of the supervisors of the town of Skaneateles. Same was received in evidence and marked Ex. 34, and is hereto annexed.

GEORGE BARROW, being sworn as a witness for the plaintiff and examined by Mr. Hawley of counsel for the plaintiff, testified:

I reside in Skaneateles, and have for a good many years. I am
an attorney-at-law. I have been connected with the Skaneateles
Water Works Company ever since its organization, and am now,
and am the plaintiff's attorney in these actions. I remember the
time when the water company made an application to the village
board for the extension of the time for the construction of their
works which resulted in the passage of the resolution which
38 is a part of Ex. 34. I was present on that occasion. I am
able to say whether prior to that time the stock of the com-
pany had any of it changed hands from the original incorporators.
It had. At the time of this village meeting there were other stock-

holders of the company present besides myself, namely, Edward S. Perot of New York; James P. McQuaid; he resided I think in New York. We three gentlemen went there together to make this application to the village. It resulted in the passage of the resolution which is contained in Ex. 34. These gentlemen were known to the trustees or introduced to them. The plaintiff constructed those water works about the year 1889, during that year. The franchise contained some conditions that the hydrants should be located according to the wishes or direction of the village authorities. That was done.

(Mr. Tracy: I don't dispute but what the hydrants were located as the village directed.)

Witness resumed: Well there were some changes made afterward. They were located in accordance with the direction of the village authorities. At the time these water works were constructed there were no other water works in the village of Skaneateles. And there never had been during my acquaintance, and there never has been until the inauguration of the present movement on the part of the village. Prior to the incorporation of the
39 plaintiff, as a citizen I made an effort as a citizen of Skaneateles to have organized there a municipal corporation. I made efforts to work up a sentiment in favor of the construction of a water-works system by the village. I saw prominent citizens of the village of Skaneateles and conversed with them on the subject. I could not state who they were. I urged in such conversation the need of the village for a water system of its own and the advantages to be derived from it. My effort in that respect was quite general. I should think I must have talked with fifteen at least, fifteen leading citizens at that time. I don't recollect that I conversed with the then existing members of the board of trustees. I don't recollect that I could name the trustees as any I talked with. After that I entered into the plan and promoted to some extent the organization of the present plaintiff. They went on and constructed their system. The pipes are laid in all the streets of the village I think; they do not extend in some cases to the ends of all the streets, but they extend so far as to cover the dwellings substantially upon the different streets. And the system is a pumping system with a pumping plant on the shore of Skaneateles lake, and the water is elevated to a standpipe I think about 160 or 180 feet from the lake, and is distributed through the pipes from the standpipe. The pressure has been tested for fire purposes, and it has been proved to be sufficient to furnish an adequate protection for fire. The
40 source of supply is Skaneateles lake. That is a good quality of water. The system from the time of its completion up to the first of February last has been in continuous operation without a break. I have been all the time the local representative of the company. I have never known of any complaint either as to the adequacy of the system, the service rendered to its customers or quality of the water.

I know whether or not the consent of the superintendent of public works was given to the taking of the water from the lake. The consent was in writing. I attended a meeting on the 8th of May, 1896, in Skaneateles. It was a meeting, or was called by the alleged water commissioners for the purpose of—I went there. It was held in the Library hall (so called) in Skaneateles village. The commissioners, Mr. Root, Mr. Shultz, Mr. Hall, and I don't know whether Mr. Whiting was there or not. I think he was. Among other things at that meeting I made a proposition stating I was authorized to make it by the water company. That was true, and I offered to make a lease for a term of five years for hydrant rental at $40 a year, and after that for five, ten, fifteen, twenty or thirty years at $30 per year, as they might see fit. And I also offered that if they would, the village, would take condemnation proceedings to acquire the plant of the existing company that the plaintiff in this case would pay all the expenses of the condemnation 41 proceedings except the fees of counsel employed by the village. The next day I embodied the proposition in a writing and took it to the village clerk and left it with him to be filed, which is the same document that has been put in evidence here. Nothing took place at that meeting that bears upon this controversy. No statement was made in reply to my proposition to the commissioners, no proposition and none since. I can tell you whether the income of the Skaneateles Water Company from its customers including the village has been sufficient to pay interest upon its mortgage debt and its current expenses.

Q. Will you state whether or not it has been?

Objected to by the defendants as incompetent, immaterial, not the best of evidence and calling for a conclusion.

The REFEREE: "The evidence should be confined to the income of the plaintiff from the plant and a statement of its expenditures. I sustain the objection upon the ground that the question calls for a conclusion of the witness and I permit you to show the fact by stating the amount of the income and the amount of the expenditures."

Objection sustained and the plaintiff excepted.

42 I am able to state what the largest income of the company has been in any year. It has not exceeded $2,900. The annual interest charge is $2,400 now. The interest upon the bonds is $3,000. I know very nearly what the operating expenses are per annum. They will amount to at least $1,000 a year. Have a familiarity as to the rates charged by the plaintiff in Skaneateles compared in a general way with the rates ordinarily charged in municipalities of that size.

Q. I mean as to whether they are higher or lower, or about the same.

The REFEREE: "I think he may state what the rates are in the other places the size of Skaneateles."

The witness resumes: I cannot do that.

The REFEREE: "I will admit the evidence by showing the names of the places."

Objected to as calling for a conclusion, incompetent, immaterial. The objection was sustained, and the plaintiff excepted.

Prior to the appointment of the present water commissioners there had never been any water commissioners in Skaneateles. The board of trustees of the village had never organized as a water board. The population of Skaneateles is a little less than 2,000. Its assessed valuation is approximately one million and a quarter.
To my knowledge that present company, the Skaneateles
43 Water Company has not been requested by the village to
furnish water pursuant to the conditions of the franchise
since Feb. 1, 1896.
The superintendent of the Skaneateles water works is John Burton.

The plaintiff offered in evidence a letter dated Jan. 30, 1896, which was received and is as follows:

"SKANEATELES, N. Y., *January* 30, 1896.

John Burton, superintendent Skaneateles Water Works Co.

DEAR SIR: At a meeting of the board of trustees, held January 29th, 1896, the following resolution was passed: Resolved, That we refuse to enter into contract with the Skaneateles Water Works Company for the rental of hydrants for the village of Skaneateles, for the sense of the tax-payers is in favor of municipal ownership. Carried.

E. NORMAN LESLIE, *President.*
JOHN CONNELL,
EDWIN WHITING,
FRANK ADAMS, *Trustees.*

Per order of the board of trustees.

S. E. BENEDICT, *Clerk.*"

44 Cross-examination:

I should say I talked with at least 15 men about the subject of water. I can't give you the names of those men. I can give you the names of men that I believe now I did talk with. I don't believe I could name positively any of the parties who were adverse to the village owning the water works, or the same being established. I acted as attorney in getting up this corporation. The original incorporators were John E. Waller, George H. Wicks, Lewis B. Fitch, Edwin E. Hall, John McNamara, Benjamin F. Petherin and George Barrow. Those were the original incorporators. I think John K. Knox was also one of the incorporators. After the articles of incorporation were framed subscriptions were opened to capital stock. I couldn't tell where those subscriptions are. I couldn't tell you whether they were preserved. I presume they were. I have no reason to think they have been destroyed by the plaintiff. I could not tell you whether stock books were opened. I think there were. I think there was a stock ledger showing the capital stock to be taken, and who it was issued to. I don't know whether there is a stub book with stubs of the certificates. I never kept it. I don't know whether there was or not. I don't know when the

capital stock was issued. In the first place I think there
was seven of us who subscribed and paid for seven
45 shares. I think the incorporators subscribed for ten shares
each and paid for that; that had to be done you know by law I think. That was done at any rate. I know there was seven of the directors subscribed for and took each of them ten shares. They paid for that, $100. That is I mean the shares were $100 apiece. I think they paid for the entire ten shares $1,000. It is my recollection that we paid $1,000 for ten shares at the time of the organization. Stock was not issued to me at that time. There was afterward. We subscribed for it and paid in so much money. We paid in 10 per cent. of the subscription or paid the whole amount. I think the whole subscription was paid in, but I am not positive. Subsequent to that time some of the incorporators failed to subscribe for capital stock. I think Mr. Knox, Mr. Wicks, Mr. Hall, Mr. McNamar, Mr. Petherin and I subscribed, and my son, Charles A. Barrow, he became a director in somebody else's place and subscribed.

I think the rest of the incorporators did not subscribe. There was some who did not; I think I have got those right. All those I have mentioned subscribed and paid in a thousand dollars apiece; that is what I understand. That is my recollection of the way it was done. I could not tell you how they paid in. I think it was checks, all gave checks. Whether the checks were paid I don't know. The next thing that was done in relation to the stock was
after the—there was a contract made for the construction of
46 the plant. I don't know whether that was the next step, but
it was a step in the proceeding. I don't know of any stock being issued after this first lot that I have mentioned before the contract was made. The first contract was made with the Skaneateles Construction Company. That was executed. I couldn't tell you who composed it. I was one of the members of that company. I think Mr. Hawley was not. It never had an office in Skaneateles. I could not tell you whether any resident of Skaneateles was ever connected with it. I don't know that it was a corporation. I presume it was an association got up for the purpose of constructing these water works. I don't know whether it ever had any other business before or since; none that I know of. I think it was organized in New York, but I don't know. I had nothing to do with the organization. I think that a man by the name of Thomas S. Goodrich, and a man by the name of Jackson, and a man by the name of McQuaid; and I don't know but a man by the name of Perot were members. I don't know but W. S. Pirot was a member of it. I think he may have been. I couldn't tell whether they were connected with the American Pipe Line Manufacturing Company. I think some of them had some interest in that company. I think Pirot had an interest in that company. I don't know of any others that did. The American Pipe Line didn't have a branch in this State that I am aware of. The American Pipe Manufacturing Company, not that I am aware of.

The next step was a contract with this company under
47 which the works were constructed. I don't know where
that contract is. I couldn't tell whether the water works company has it, or a copy of it. I never saw it myself. Had nothing to do with the drawing of it. That business was transacted in New York and I didn't draw the contract. I have heard there was such a contract. I have seen a partial record of it in the minutes of the company. I will swear I have never seen it, never tried to see it. So far as I know the company have the contract or a copy. I have never heard of its being destroyed. I know what substantially the terms were; substantially that is as I was informed. I know it by hearsay and I know it by having seen the record of it upon the minutes but the record didn't have a copy of it. The resolution authorizing them to make a contract on certain terms mentioned. I don't know that I can get the contract; if I can I will; I will write for it. Subsequent to the execution of this contract the corporation I suppose delivered a number of bonds. That I know from hearsay. The Skaneateles Construction Company didn't put in the water plant. The American Pipe Manufacturing Company did. The construction company assigned the contract to the pipe line company, and the latter put in the plant. I think I have seen that assignment. I think it is with the papers of the company. After making this contract I suppose the Skaneateles
water works delivered a quantity of bonds. I only know
48 that by hearsay. I understand they did. I drew the mort-
gage and the bonds; had them printed. I suppose the bonds were delivered after they were certified by the trust company to the water company. When they had been delivered to the water company then the water company sold them. The water company delivered them I suppose, I wasn't present, but I suppose they delivered to the American Pipe Manufacturing Company. Those bonds amounted to $40,000. As far as I know no money was paid to the pipe line for them, and I know of no other consideration than this plant. At the time of this delivery of these bonds my recollection is that the trustees of the water works company were Edwin E. Hall of Skaneateles, myself, W. S. Pirot, who lived in New York. I could not tell you whether James Skeel was a trustee. I could not tell you that I prepared the annual reports. I could not give you the date when the bonds were issued. I think Joseph W. Hawley was a trustee of the company at that time. I could not tell you whether Edward S. Pirot was a trustee. The American Pipe Manufacturing Company was not a trustee that I know of. I do not think it ever was. It is news to me if they were. At the time of the issue of the bonds I think about $33,000 worth of the stock was held by the American Pipe Manufacturing Company. The whole capital stock was $40,000. The rest of it was held by those persons that I have mentioned, ten shares each. Hawley
had become a stockholder; I think he had at that time.
49 I think somebody had resigned and he had been elected and
the stock had been transferred to him. Some of the original incorporators held the stock at the time of issuing those bonds. I

did. My son did, Charles E. Barrow, Edwin E. Hall. I don't know of any more, I don't know but some others. Whether there were any more I don't know. No, I think not. I presume the stock book of the corporation would show. I don't know anything about the stock book, I never saw it. The construction company had this contract and agreed to complete the works for $40,000 of bonds and a certain amount of the stock. So that as a matter of fact when these bonds were issued the principal stockholder was the corporation to whom the bonds were issued, and that corporation was the assignee of the construction contract. In 1894 the stock was increased $10,000. At that time most of the stock was held by Joseph W. Hawley and myself, and I prepared the papers for the increase of the capital stock. Mr. Hawley then owned $20,000, Edwin E. Hall $10,000 and myself $10,000. I had acquired my stock from the American Pipe Manufacturing Company except what I had before.

Q. And what did you pay for it?

Objected to as irrelevant and immaterial; objection overruled; exception.

A. I paid nothing. Whether I was merely a nominal holder is a question of law I take it. There was no cash consideration for
the transfer. I think there was a consideration. I think my
50 relations to the whole thing were a consideration. Just legal
services and future legal services and general friendship. I gave no money for the stock. I now remember no other consideration than what I have stated. That accounts for $30,000. The rest was held as I said, Mr. Hall 10,000 Joseph W. Hawley 20,000. That accounts for it all. I think perhaps there was some scattering shares that were held by other parties, and probably Mr. Hawley's didn't amount fully to 20,000; what Mr. Hawley really had at that time I don't know. I don't know anything about the stock books. I don't know whether they ever kept any, I have never seen any. There were really stock certificates, I have got certificates in the office. We have never paid any dividends on the stock. These people substantially continued to be the stockholders down to the time of the expiration of this contract on Feb. 1. Mr. Hawley had purchased Edwin E. Hall's stock prior to the expiration of the contract. I know from hearsay how much. I think Hall told me $2,000 or $2,500, I forget which, and that gave him a majority of the stock. We haven't been regularly assessed to pay expenses, but we have paid expenses out of our pockets as stockholders. I could not now tell you how much I have paid, but I have paid several hundred dollars, at different times. I have paid $200 at a time or more in cash. I was credited for services. I have been paid from time to time for services, not in money, in stock. I don't hold any
of these bonds, never held any of them. There were two
51 issues of bonds, the first was $40,000 and the second $10,000.
I had charge of the proceedings of the second issue. The bonds were delivered by the trust company to the water company. I could not tell you to whom the water company delivered them.

I have no knowledge on the subject. I knew nothing about the transfer of those bonds except from hearsay.

In January or February, 1896, I don't remember having an interview with a reporter of a paper in Skaneateles. I have an indistinct recollection of something of that sort, of an interview being published in the Democrat Free Press or Skaneateles Democrat. I have never corrected the statement contained in that interview. I don't know whether I stated to the reporter at that time that I had little or no interest in the company. If I did it was pretty true. I don't recollect whether I did or not. I am not aware that I told him that I held scarcely any stock in it.

At the meeting I have spoken of where I made some offer on the part of the company to furnish water, I didn't state that I owned $5,000 worth of stock in the company, that I had paid money for, or paid in money. I didn't at that meeting state that I had paid $5,000 in cash for this stock. Nothing of that kind. Nor that I had paid into the company $5,000 in cash.

52 In regard to this plant, there are not two streets that I am aware of that the pipes are not laid in. I don't think there is any Austin street in the village. I think they are laid in West Austin street. I don't know whether they are laid in Hannon street or not. In January and February I was the general manager of the Skaneateles water works, the superintendent used to consult me sometimes and I gave him directions from time to time. I knew of this letter of Feb. 24, written by Mr. Hawley, in which he stated, I give you formal notice that the hydrants have been closed, at the time it was written, I think. Burton collects the rents now; he has got charge of the books he keeps, not the books of the company. I have none. The treasurer has. She is M. M. Hawley of Philadelphia. The books were sent away from Skaneateles long ago, two or three years ago. I don't think the books have been in Skaneateles since 1890 or 1891. When the increase of capital stock was made they had a meeting in Skaneateles and came up and brought the books with them. I think. At the time they increased the capital stock I can't tell you who was there. I think a good many votes were cast by proxy. We had a quorum. I couldn't tell you who own the bonds of this concern now. I don't know the owner of a single bond. I have heard Mr. Hawley say his wife owned a $500 bond. I haven't heard him say he owned a majority of the bonds. I don't know what the gross receipts were last
year, or the year before except from an examination of
53 the books kept by Mr. Burton. I have examined those books
for that purpose. In regard to the interest on these bonds I know nothing up to what time the interest has been paid excepting by hearsay. I have sometimes provided means for the payment. The receipts are sent to the treasurer at Philadelphia. I don't know the actual cost of construction. There are 40 hydrants in the plant. M. M. Hawley is at present the treasurer, daughter of Joseph W. Hawley. I should think she had been about two years. At the time this contract expired Feb. 1, 1896, Charles E. Barrow, Joseph W. Hawley, — M. M. Hawley were trustees; I couldn't tell the

others. I know of no other members residents of Skaneateles that were trustees at that time. A majority of the trustees at that time were non-residents of the State, and a majority of the capital stock was then owned by non-residents of the State. I have no knowledge of the number of bonds held by residents of this State.

Q. Bonds were issued to the Pipe Line Company in Pennsylvania and sold to them?

A. No; well, yes; sold them to the trust company.

Q. Well, that was another Pennsylvania concern?

A. Yes.

As far as I have been informed they circulated to some people in this State. As I understand a small amount, in small amounts at all events. I think I knew of this letter of May 27, 1896, at
54 or about the time it was written. I think we had some correspondence about it and agreed upon it. I knew that such a letter was to be sent I believe. I never knew of the letter of April 6. I think I had a talk or correspondence with Mr. Hawley before the letter of Jan. 2 was written. I think it was written under my advice or with my approval.

Being re-examined by Mr. Hawley, he testified:

There have never been any breaks in this pipe that is laid in Skaneateles, nor leaks except when they have been broken by somebody else. This system was arranged so that in case of fire we pump directly into the mains so as to have direct pressure from the pump. There was a communication between the headquarters of the fire department and the public station, telephone or something of that sort. So that in case of fire we immediately get the direct pressure of the pumps whether the standpipe is full or not. So far as my information goes no complaint was ever made in regard to its adequacy.

The nature of the plant that is being constructed is, they construct a reservoir instead of a standpipe and the reservoir as constructed, it is not at as great an elevation as the standpipe. That reservoir is constructed on an elevation upon the lake shore, somewhat further from the lake shore than the standpipe at the present time. I
55 can't tell how much further, but a quarter of a mile I should think, they have dug a well, it is called a well upon the shore of the lake. Water reaches the well by percolation from the lake, and the water is to be pumped from this well to the reservoir and distributed through iron pipes instead of cement pipes. The well is situated on the south side of Genesee street about 400 feet west of the outlet at the north end of the lake and between the west shore and the riprap dam, extending out into the lake upon the east side. The depth of it I couldn't tell; I couldn't tell the diameter. It is the same water, water from Skaneateles lake as we have there. The water is taken from Skaneateles lake.

Plaintiff rests.

The defendants moved to dismiss the complaint on the ground that plaintiff has failed to prove a cause of action, and also upon the ground that the plaintiff is incorporated under an act which provides they may take water from other sources and feeders than the reservoir of the Erie canal, and that Skaneateles lake is one of such reservoirs.

Motion denied.

Mr. Tracy, for the defendants, offered in evidence at a meeting held June 29, 1843, a certified copy of a proceeding of the canal board.

56 The plaintiff objected to the reception of the paper as being immaterial, irrelevant and incompetent. The objection was overruled. The plaintiff excepted.

The paper was read in evidence and is as follows:

"At a meeting of the canal board, held June 29, 1843, present, Messrs. Earll, Jones, Enos, Little, Farrington, Barker and Flagg.

"The canal commissioners having represented to the canal board that the supply of water from the present feeders from that portion of the Erie canal extending from the lock at Geddes to the Seneca River lock at Montezuma, and upon as much of the Cayuga and Seneca canal as is located between the Erie canal at Montezuma and the Seneca river and the Cayuga lake is found to be insufficient for the purpose of navigation. And the canal commissioners having also further represented to the canal board that the deficiency of said supply may be obtained from the Skaneateles lake at a less expense to the State than the same can be obtained elsewhere, and having caused the necessary surveys and levels to be taken and accurate drafts, plans and maps of the contemplated improvement, together with the estimate and minute details of the probable expense to be incurred thereby to be made and submitted to the canal board, which estimated expenses does not exceed the sum of thirty thousand dollars, therefore, is was,

57 "Resolved, That the waters of the Skaneateles lake and the outlet of the same be and they are hereby appropriated to the use of the public for reservoir and feeder to the Erie canal.

"Resolved, That the canal commissioners be directed to make the improvements necessary to carry the above resolution into effect."

The defendant- then offered in evidence the proceedings of the canal board May 16, 1827.

Objected to upon the ground that it was incompetent, immaterial, improper and irrelevant by the plaintiff. The objection was overruled, and the plaintiff excepted.

The same was then read in evidence, and was as follows:

"At a meeting of the canal board held; 6 May, 1827, 9 o'clock a. m.; present St. Van Rensselaer, president of the board of canal commissioners; Nathaniel Pitcher, lt. governor; S. Young; William C. Bouck, H. Seymour, canal commissioners; S. De Witt, surveyor general; A. C. Flagg, secretary of state; A. Keyser, treasurer; William L. March, comptroller.

"Resolved, That the canal commissioners be and they are hereby authorized to construct a dam across the outlet of the Skaneateles lake to supply the Jordan feeder."

Defendant- next offered proceedings of canal board of March 13, 1833.

58 Plaintiff objected on the same ground as before. The objection was overruled; and the plaintiff excepted.

The proceedings were received in evidence and were as follows:

"Present, Samuel Young, canal commissioner, president *pro tem.;* William S. Bouck (ditto); Jonas Earll, Jr., (ditto); Azariah C. Flagg comptroller; John A. Dix, secretary of State; Green C. Bronson attorney general; Abraham A. Keyser, treasurer.

"Resolved, That the canal commissioners be directed to make an improvement in the Skaneateles creek feeder to the Erie canal in the county of Onondaga, by filling up the sinks in the bed of said creek, or by carrying the water past said sinks in raceways for the purpose of increasing the quantity of water in said feeder where it enters said canal."

The defendant- next offered in evidence the proceedings of the board of canal commissioners on the 6th day of September, 1842.

The same was objected to as being incompetent, immaterial and irrelevant. The objection was overruled; and the plaintiff excepted.

The same was read in evidence and was as follows:

"At a meeting of the board of canal commissioners held at the canal department in the city of Albany on the 6th day of
59 September, 1842. Present: Jonas Earll, Daniel P. Bissell, Benjamin Enos and George W. Little.

"Whereas, it has been found that the supply of water from the present feeders upon that portion of the Erie canal included between the lock at Geddes and the Seneca River lock at Montezuma; also the Cayuga and Seneca canal from Montezuma to the Seneca river and Cayuga lake is insufficient for the purposes of navigation; and

"Whereas, it appears from a report of Orville W. Childs, the chief engineer in the employ of the State, bearing date January 6th, 1842, that the remainder of the required supply of water for that portion of the Erie canal above mentioned may be obtained from the Skaneateles lake and the outlet thereof with more economy than from other sources, it was therefore

"Resolved, That the waters of the Skaneateles lake and outlet be and the same are hereby appropriated to the public use for a reservoir and feeder to the Erie canal.

"Resolved, That the plan upon which it is proposed to construct such feeder, together with the surveys, levels and estimates of the expense be submitted to the canal board for their approbation pursuant to the provisions of the 17th and 18th sections of article 2, title 9, chapter 9 of the first part of the Revised Statutes.

"GEORGE W. LITTLE, *Secretary.*"

60 Defendant- next offered in evidence proceedings of the canal board on the 6th day of September, 1842.

The same were objected to upon the same grounds as before by the plaintiff. The objection was overruled, and the plaintiff excepted.

The proceedings were read in evidence, and were as follows:

"At a meeting of the canal board, 9 o'clock a. m., September 6, 1842. Present: Messrs. Earll, Flagg, Farrington, Jones, Bissell, Enos and Little.

"The canal commissioners having represented to the canal board that the supply of water from the present feeders upon that portion of the Erie canal extending from the lock at Geddes to the Seneca River lock at Montezuma, and upon so much of the Cayuga and Seneca canal as is included between the Erie canal at Montezuma and the Seneca river and Cayuga lake is found to be insufficient for the purposes of navigation. And the canal commissioners having also further represented to the canal board that the deficiency of said supply may be obtained from the Skaneateles lake at a less expense to the State than the same can be obtained elsewhere And the said canal commissioners having appropriated the waters of the aforesaid lake and outlet to the use of the public as a reservoir and feeder to the Erie canal, and having caused the necessary
61 surveys and levels to be taken and accurate draft, plans and
maps of the contemplated improvement, together with an estimate in minute detail of the probable expense to be incurred thereby, to be made, from which estimate it appears the expense to be incurred is $14,927.55, all of which said commissioners having submitted to the said board for their approbation. Thereupon it was

"Resolved, That the canal commissioners be directed to construct a reservoir and feeder of the Skaneateles lake and outlet by means of cutting down the outlet thereof in the manner following, to wit:

"At a point immediately below the present dam the cut shall have a depth of 6 feet below the surface of the stream and shall extend down the outlet a distance of 123 chains, going to the bottom an inclination of $\frac{27}{100}$ of a foot per chain, and a width at the upper end of 21 feet, and at the lower end a width of 25 feet. A cut extending from the upper side of the present dam 8 chains into the lake shall also be so excavated as to furnish 7 feet depth of water measuring from the surface of high water as indicated by a marked stone monument situated at the west side of the outlet near the southwest wing of the turnpike bridge crossing said outlet. The bottom of said cut to be horizontal and shall have a width of 35 feet with sides sloping as 2 to 1. Gates of cast iron by which the flow of the water from the reservoir may be regulated shall be placed in a framework of timber and plank, with suitable
62 abutments of stone masonry laid in hydraulic cement. The
gates to be placed sufficiently low to admit of drawing five feet in depth of the water from the whole surface of the reservoir.

"It is also resolved that the acting canal commissioner to whom the execution of the above work is committed is hereby authorized to make such alterations in the plans of constructing the aforesaid reservoir as he shall deem the interests of the State to require.

"Resolved, That before the said commissioner proceeds to the construction of such reservoir and feeder, the said commissioner shall make such arrangements with the owners of land and water power on the waters appropriated as shall secure the State from all claims for damages arising from such appropriation."

Mr. TRACY: Now it is admitted, Mr. Barrow, that the plans and maps referred to in this resolution were made?

Mr. BARROW: No, that was never carried out at all.

Mr. TRACY: Do you admit that they constructed a reservoir, or made improvements there so as to make it a reservoir for the canal?

Mr. BARROW: No.

Mr. Tracy for the defendants next offered in evidence proceedings of the board of canal commissioners of June 30, 1843.

63 Same were objected to as before. The objection was overruled and the plaintiff excepted.

The same were then read in evidence and were as follows:

"At a meeting of the board of canal commissioners, held at the State hall in the city of Albany on the 30th day of June, 1843. Present, Messrs. Earll, Bissell, Enos and Little.

"Resolved, That this board in compliance with a resolution of the canal board of the 29th inst. make the improvements necessary to carry into effect the resolution of said canal board of the same date appropriating to the use of the public the waters of the Skaneateles lake, and the outlet thereof, as a reservoir and feeder to the Erie canal."

JOHN A. BURTON, being called by the defendant- and sworn, being examined by Mr. Tracy, testified as follows:

I am the superintendent of the Skaneateles water works; have been ever since the plant started six years ago last November. I have here the books showing the people taking water; the day book and ledger showing the collections and deposits. Nothing in the books except to show the rents received for the water. At the present time there are 130 actual takers, 152 numbers on the books, but 20 of them are cut off, I think, dropped off. Haven't been
64 in the annual rental or since this action started. Probably half a dozen I think dropped off this summer. The others before that. Some people moved out of town and others stopped using the sprinklers. The total rents received since the village stopped taking about $1,800. When the village took $3,000; the village took $1,200. I have never seen the stock books of the company and know nothing about them, or of them being in Skaneateles.

Being cross-examined, he testified:

I began in 1890 to act for this company and have acted ever since. For the first three years I did not keep the books, but the income of course showed very small, had to start in with nothing and worked up gradually. The income of the year ending 1895, in comparison with previous years was about the same. The income of 1894, including village rental is $2,200. In 1895, about $2,600. The expenses excluding the interest upon the bonds for 1894, were about

$1,000. They varied maybe a few dollars more. For 1895 about the same. For 1896 I don't think it varies a great deal, just about the same, about $1,000 a year. That includes my salary and coal. My salary in 1894 was $60 a month.

Re-examined by Mr. TRACY, he testified:

I didn't mean to be understood that the gross receipts in 1896,
were $2,900 because the village shut off the water. They are
65 about $1,800. What the village formerly paid was $1,200.
Our receipts ran up $300 between 1895 and 1896. This includes a month's hydrant rental, one month's hydrant rental for February, 1896. That makes about $1,700 for 1896, $1,800 with that month's rental. The number of houses in Skaneateles on our pipe line is 310. 130 takers now, 150 on the books altogether. This statement of houses includes some of the blocks. The Eckett block is included in that. All the blocks. That is there were so many houses on our line. That included all the blocks there is. More than one taker in some of the blocks, but now the Eckett block pays for them all. Dillon is a separate taker and the postmaster is a separate taker. So there are three takers in the Eckett block. No more in any other block.

EDWIN WHITING, being called by the defendant-, and sworn, examined by Mr. Tracy, testified as follows:

I reside in the village of Skaneateles. Am one of the trustees of the village; have been a year and a half, a little over, nearly two years. The election was held in the engine-house, across the hall or next to a room called the trustee room. There was a hall between the two. The village elections generally have been
66 held in the engine-room since booths were adopted. It
is larger than the trustees' room; and after the law was adopted requiring booths to be used it was found the trustees' room was rather small for the purpose, and after that elections were held in the engine-room and have been ever since, village elections. I was one of the trustees of the village when this contract expired in February, 1896, with the plaintiff. Up to that time there had been no suggestion so far as I know that the village should own water works; after the plaintiff demanded $50 a hydrant this whole agitation arose.

By Mr. TRACY:

Q. Was there any suggestion up to the time of the termination of this contract, or up to the time of the receipt of this letter from the plaintiff demanding $50 a hydrant, was there any suggestion, up to that time, that the contract should not be renewed at its expiration?

Objected to by the plaintiff as incompetent and improper. Objection was overruled, and the plaintiff excepted.

A. There was none.

I saw the letters of Mr. Hawley that have been read in evidence

about the time of their receipt. That letter of Jan. 2, and another of Jan. 21, 1896. And after the receipt of those letters I learned that the hydrants had been cut off. I could not give the date when.
I think it was shortly after Feb. 1, 1896. Shortly after the
67 expiration of the contract, within a few days. And I subsequently acted on that belief.

Being cross-examined by Mr. Barrow, he testified:

I heard that the hydrants were cut off about Feb. 10; could not give you the correct date. I don't remember who told me. I can't name any person from whom I received that information. One reason how I learned it I saw Burton take something out of the hydrant; out of two or three in front of my place of business there that I saw. There are two or three right there within 40 rods. I could not tell you what I saw him take out for I don't know what they call it, looked like some pieces of iron, nearer round than long; might have been two or three inches in diameter. I don't know what part of the hydrant that came from. I saw him take the nut off the top of the hydrant and take something out and put it back again. I couldn't state positively that what he took out from the inside was a piece of iron about three inches in diameter. I saw that done to two hydrants at least. I didn't give any date when that was done, about the 10th of February; I did not see him put them back again. I heard that he put it back. I couldn't tell
when I heard that. It was after this action was commenced.
68 I didn't pay any attention to the hydrants when the nut on
the top was removed from them. I don't know but that he
put the nut back the same day I saw him take it out. The trustees of the village of Skaneateles never offered to renew the existing contract at the rate of $40 per hydrant that I know of. I don't think the trustees of the village of Skaneateles ever asked the Skaneateles Water Works Company to furnish water to the village at the rate of $40 per hydrant. They did ask the water company to furnish water to the village at $30 a hydrant. It was by letter. I couldn't tell you whether it was signed by the president or clerk. I think the village passed a resolution directing that offer to be made about the first of February. I could not give you the date. I have a distinct recollection of it only as I have stated. I have a distinct recollection that they did pass such a resolution. I can't give the wording of it. I think it does appear upon the minutes. If I hadn't thought it did appear upon the record I should not have stated so. I think they passed or adopted such a resolution because I think it appears upon the record. No one has told me that there is such a resolution upon the records. I learned that it appeared upon the record from memory. We are supposed to have a clerk who keeps all
the records of the proceedings. In the village building there
69 are three rooms I think. The building is called "engine-
house." In the engine-house there is a room known as the
trustees' room and there is a room known as the fireman's room. This meeting on the 9th of May was not held in the trustees' room; the 9th of May the meeting was held in the fireman's room, 3 or 4

elections have been held in the room; no elections have been held in the trustees' room since I have been on the board. There have before. I recollect the meeting held in the trustees' room. I think that was in 1894. Now this meeting that I have been speaking about was held upon the 9th of May, 1896.

Redirect examination by Mr. TRACY:

In regard to those things they took off the hydrants, I don't know what they call them.

Q. State whether or not at a meeting of the board of trustees at which the president of the village was present the question was discussed as to offering to make a contract for the period of a year at the rate of $30 a hydrant.

Objected to upon the ground that it is incompetent, immaterial and irrelevant.

Objection overruled, and the plaintiff excepted.

70 Q. State whether or not at that meeting it was agreed that the president should communicate the proposition to the plaintiff, The Water Works Company.

A. It was.

When I testified this morning that a resolution was passed in reference to that it is the same thing and I supposed that a resolution to that effect had been passed.

Recross-examination by Mr. BARROW:

I said that in pursuance of a talk we had in the board of trustees, Mr. Leslie communicated with the water company. I don't think I saw his communication. I know that he communicated merely by the resolution itself that was passed by the board. There was a resolution passed by the board. And I inferred that because the resoution was passed Mr. Leslie did communicate, that is all I know about it of my own knowledge. I have seen some of the communications which passed between Leslie and the water company.

Redirect examination by Mr. DILLON:

The resolution that I referred to in answer to Mr. Barrow's question is the one in which it was passed by the board of trustees authorizing Mr. Leslie to communicate the same.

71 Q. Now, then as a matter of fact there was no resolution passed by the board by which they offered $30 a hydrant for the continuation of the contract for one year, and that was merely talked of among the members of the board at a meeting that is a fact, is it not?

A. That is the time I have reference to.

Recross-examination by Mr. BARROW:

Q. What was the resolution that you referred to that was passed?

A. It was talked over only once.

The formal resolution or any way you are a mind to put it, was only talked of by the board only talked just one time. I didn't say any such thing as that they adopted a resolution.

Q. Didn't you tell Mr. Dillon just now?

A. Passed by the board, it was merely talked over by the board and the president did write that letter.

By Mr. **Barrow**:

I can't tell when the meeting was when this was talked over.

John A. Burton, recalled, examined by Mr. Tracy for the defendants.

Nothing was done to the hydrants in Skaneateles after the 1st of February until the 15th. Then I took the nuts off the spindles of 20 of them. There are forty of them in the village. I did
72 that by direction of the plaintiff the water company. The spindle is the rod that goes right through here. (Illustrating on an illustration of a hydrant.) There is a nut on top there, a small nut indicated by the letter "L." This is a separate part from the spindle, the spindle goes right down through here (indicating) through the valve up through the box. That (indicating) indicates the nut on top of the spindle. That nut just drops loose onto the spindle. By removing that nut here it don't disappear from view, it leaves that space there. Taking off the top nut removes the nut. To open the hydrant you have a wrench that sets down over this nut. The nut comes through the top bolt of the hydrant; that turns the spindle that opens the valve at the bottom. When that is removed the hydrant can't be opened by use of a cast-iron wrench, it can by a monkey-wrench. There was something in possession of the village that could open that hydrant, any form of a monkey-wrench can open it. I shouldn't think one would have to know about the construction of a hydrant to know what effect it would have to use a monkey-wrench. I should judge that any man could see that a change had been made in the hydrant. Something taken out. Any man could open it with a monkey-wrench. They would have to take off that bolt and then put the monkey-wrench on to that square part of the spindle. Twenty of these were removed, distributed almost all over the village down through Genessee street,
73 all on Genessee street except the hydrant up at Mr. Barrow's house; all on George street excepting the hydrant up at Mr. Shepperd's house; all on West Lake street except the hydrant in front of Edward C. Hall's house. The hydrant opposite Mr. Lyon's house was not dismantled. All on Syracuse street except in front of John Barrow's house. You notice that there was a hydrant left on each street, not opposite the houses of some promoter of this water scheme; I haven't any such instruction. There is some of the hydrants you can't take the nuts off, that the nuts is firm on the spindles. I didn't mean to say that I took them off of all the hydrants that I could. I could have taken them off twenty more. I mean to say that I was not instructed not to take the nuts off from those hydrants, I used my own discretion about that. I didn't take

them off of all that I could excepting those interested in the water company. I gave no thought to any such thing as that. There was one taken off down to the bolt shop. Mr. Barrow and Mr. Shepperd aren't interested in that concern. I am not acquainted with the bolt shop. My object in taking those nuts off was I was told to take them off. I should judge it was to scare the people if anything. It wasn't because they could not be used, because they can use them just the same. I presume the idea was to make the people believe they could not be used, that was my idea. Anybody could see that
they could be used. I can't answer whether unless they un-
71 derstood the use of a hydrant and the effect of a monkey-
wrench on the top of that he wouldn't understand the hydrants could be used. And I should say that I believe that unless this change should be made they would think it could be used. The pressure can't be reduced on the hydrants. There is no such thing as reducing the pressure unless we stop pumping altogether. The more water you get into the standpipe the greater the pressure is. If we didn't have the standpipe over a third full the pressure would be reduced very little, hardly any. It would be reduced from 80 lbs. to about 74. It would be reduced about 8 lbs. to the square inch. Under the contract I used to keep the standpipe nearly filled with water, same as I always have. I couldn't keep it full. Filled it every day, have done so for about two years. I have filled it every day for two years, and have done so since the contract expired, usually pumped every forenoon. I will swear I filled it every day. I swear to that; sometimes twice a day. Have got an elevator *guage*. I say the pressure has not been less since the contract expired, nor at any time during the summer. They always have water in the standpipe pumped once a day and sometimes twice a day. It sometimes happens that the standpipe is empty some days more than others. You know they use more water some days than others. Some days we had to pump it full twice. There was not quite
a number of days after the contract expired that we didn't
75 pump the standpipe full, always pumped it full. It is not a
fact that the pressure has been considerably reduced to consumers, and that if the consumers found there was less pressure of the water it don't tend to show that there was less water in the standpipe. It would show perhaps that a good many were using it at the same time, that would reduce your pressure. There is no other explanation that I can give. You may have twenty feet of water in the standpipe and all the hydrants be shut off and every faucet shut off and it would show a big pressure on the high points. We can't cut the hydrants off. There is a hydrant down at the railroad shop that they use for water tanks to engines, tenders and there is a motor in the Free Press office using a great deal of water. The hydrants are never used except for sprinkling or in case of fire. So the fact the hydrants were not used would not make any difference in the pressure. The only reason why there should be less pressure excepting lower water in the standpipe was more water being used by the consumers.

Recross-examination by Mr. Barrow:

So far as I know there was no difference in the pressure after this contract had expired from what it had been before. Pumped just the same, filled her up just the same. And the spindles off these hydrants were none of them removed, you couldn't remove them,
they weren't removed and the pressure was always the same
76 since the contract as before so far as I know upon the hydrants.
And during this time since the contract has expired I furnished the same water for the motor that requires such an amount of pressure. I have a letter from the office from Mr. Hawley the president, instructing me to take those nuts off. They were subsequently replaced; it was some time in the early part of June, and I can't swear just when. That is the best of my recollection.

Re-examination by Mr. Tracy:

That was after the village had voted for the water tax that I put the nuts on. When I took the nuts off to make the people think the hydrants could not be used I could not tell you what impression I created. As far as I know I suppose they believed they could not be used.

Q. And you never undertook to undeceive them?

A. I had nothing to say either way; it wasn't my place.

Q. And when you put the nuts on did you tell anybody that you had done so?

A. They saw me working on them. You can't do anything there without they see you.

Q. Who saw you, Barrow?

A. Well that is a question. Mr. Barrow saw me. I don't believe I have got the letter of Mr. Hawley telling me to take those nuts off. I never keep any of his letters, never bother. None of my
correspondence with Mr. Hawley has been kept. I simply
77 obey orders as soon as I got them and then destroyed them,
and I obeyed that order.

Q. How much water do you pump every day in the summer?

A. Well I have pumped 80,000 gallons in one day. The standpipe holds 80,000, about 80,000, not quite, 78 and a fraction. It is 40 feet high, 18 feet in diameter and holds nearly 30,000 to the foot. I could not tell you how many days I would pump 80,000 during the summer. Often I had to pump twice a day, then other days I pumped 80,000. That was for street and lawn sprinkling and waste in general. When the street sprinkling commenced I had to prepare the hydrants so they could draw water. They went to me and told me they had to be fixed, Mr. Prentice did that. Well, I think it was Richards came and told me. I never figured up what the Free Press office uses. There is no meter there, never was. I don't believe I could answer how much the railroad company uses. They use it for engines and sprinkling coal and washing cars. They run two engines in the summer time, one in the winter.

WARREN B. DE WITT, recalled by the defendant-, and examined by Mr. Tracy:

78 The ballots were printed "For the water tax" and "Against the water tax." Twenty-seven ballots were cast against the water tax; 118 were cast for the water tax. Ballots were printed, in the form you now show me.

Form of ballot offered in evidence, received and marked Ex. 36 and hereto annexed.

After the ballots were counted the result of the election was announced, declared in favor of the water tax, and it stated how many had been cast for and how many against. (Witness shown paper.) I found this paper among my records in the clerk's office. I know a number of the persons whose names are signed to these papers to be residents of the village, a number of them are prominent citizens there.

Paper offered in evidence by the defendant; received and marked Ex. 37.

Only one person was challenged during this election. He didn't swear in his vote or attempt to do so. He was challenged upon the ground that he was a non-resident of the village and therefore not a voter of the village.

79 EDWARD E. ECKETT sworn.

To Mr. DILLON:

I attended the public meeting we had at Library hall. Mr. Barrow was one of the principal speakers. I heard him state upon the platform that he had $5,000 in that of his own money. He says, I have $5,000 of my own money in that water plant, and I have put my hand down in my pocket and paid my share of the deficiency every year.

By Mr. BARROW:

I have not been one of the most active promoters of this new scheme of municipal water works in Skaneateles. I knew nothing about their appointing me a water commissioner until I heard that they were going to; came and asked me if I would have any objection. I told them I was willing to do anything that would be a benefit to the village. I have a feeling that I want to do all I can for the interests of the village and not against. My feeling against the old water company has not been a very bitter one. I am a great taker of water up there. But when they wanted to do what I didn't think was right, then, of course, I didn't—I went with a majority of the people. Since then I have done my duty as water commissioner for the village. I don't know that I have been any more active than the rest of the board. I might say I have been very active. I have not expressed myself against the 80 old company in a very bitter way. Against its officers I might have expressed my feeling, the way I felt in regard to some of them that got the franchise; because I have always considered that they got the franchise renewed in anything but an honorable way. They had a special meeting when the citizens and tax-payers were getting up a petition to present to the trustees at that time advising them not to renew that franchise. I say that I thought it was not an honorable way of getting that franchise renewed, when you called a special meeting with only three trustees present, in the absence of the president, your brother one of the trustees, only just two present, and in the absence of the president of the village and the clerk, to have a special meeting and get that franchise renewed—I didn't think that was an honorable way of doing it.

Q. The whole board of trustees voted for it?

A. The way I have seen it recorded, the president was not present, nor the clerk. The clerk don't vote. But I say if it was done it ought to have been taken up and had a full board. I didn't think it was an honorable way. If it had been done in a reasonable way it would have been done at one of the regular meetings of the board.

To Mr. Dillon:

81 I have understood that Mr. Shepard, the other trustee, was a business partner and a relative of Mr. Hall, one of the promoters of this thing—going around with a paper under his arm getting people to sign at the beginning of this.

George Barrow, recalled and examined by Mr. Dillon:

I don't know whether or not the old plant could have been purchased for $30,000.

Warren B. De Witt, being recalled and examined by Mr. Tracy, testified:

There was a contract made as I understand, that has been produced here, for the construction of the new water works. Subsequently there was an amendment of that contract signed by the parties; it is at Skaneateles I think. The well has been constructed by day labor. There was no contract for it. There was an estimate of its cost in writing. The contractor made it. I have got it at the office. The suction pipe to the well shows in the first contract. The suction pipe from the well to the pump-house was not in the original contract. That work has not been done yet, no, sir. No 82 contract has been made for it. There is an estimate of its cost put in by the contractor. He has offered to do the work for a certain price. I think the estimate is in my office. The board made a sort of estimate on it. I haven't it in writing but I think one of the board has. I know about what it was I think. I think Mr. Hall has it. The present idea is to take the water through a well. Running out into the lake from the pump-house, the engineer estimates the distance to be about 2,000 feet; that is if we run into the lake instead of taking the water in the well. That is provided for in the contract that has been put in evidence; the rate that is to be paid a foot.

Being cross-examined, he testified:

The original construction contract was amended; that is a subsequent contract was made afterward; there was a change. That contract was in writing signed by both parties. It is in my possession, or the possession of the village, this amended contract. The well was constructed, or is partly constructed, by day labor. I mean by that there wasn't any particular contract for it. The contractor
did it by day labor and kept track of it. The contractor was
83 to perform the work required in the construction of this well
by hiring day laborers to do it, and it was to be charged by
him to the water board. That was according to the first contract. No contract price upon it. No price put upon the day labor that I know of. The engineer was not to receive compensation for overseeing that part of the work that I know of. I suppose he did oversee it. I don't suppose he employed labor. I suppose Mr. Marsden employed it and paid for it. The work was done under Mr. Marsden's supervision, I suppose, the contractor. I don't know whether it was done under anybody's supervision. As to its being done under Mr. Hall's supervision, like everything else he was the committee to look after that particular part of the work. I couldn't swear he was there every day. He didn't employ the labor that I know of. Nor the machinery that was used there. I don't think there was a contract for the construction of this well. There was no contract. I have no personal knowledge and didn't hear any conversation in regard to the construction of the well between the commissioners and engineer at any time, that I can remember of now. The lake I should think is forty feet from where the well is constructed.

To the REFEREE:

The well was put there to get water from.

I couldn't say whether it was put there for the purpose of getting
water from the lake or not. Some of them don't think it
84 comes from the lake at all. When they put it there they
thought they could get a supply of water; they don't hold it
is from the lake. I know at the time the Syracuse people put their pipes in there I saw gravel veins running in from the lake shore near by where this well is situated, in under the road. I don't know whether it run in from the lake though. I observed what came through at that time. The water came in from all directions near by. I was working down Railroad street then and I wasn't there but once in a while. If I had a chance I ran over there, not very often. I have been there. And I observed then that great quantities of water came to what was their well-house, which was right on the opposite side of the highway, so that they had to put in large pumps to pump it out. At the time this idea of putting a well at that point was discussed I heard some discussion about it, I presume. I don't think I heard them say that by put-

ting a well there they could get water from the lake. I don't think they said they could get water from the lake. I don't remember what I did hear them say. I couldn't tell now what they did say. I don't think they said they could get water from the lake. They said that would act as a filter, coming through the gravel. The water coming through the gravel, the gravel would act as a filter. There was some talk about the gravel, that is all about that I remember about it. They thought the
gravel must be around there anyway. They said there was
85 gravel there then and there must be there now, when the
Syracuse people laid their pipe and there must be there now.
I didn't hear anything said about the ability to get a sufficient supply of water in that well because it would come from the lake. They thought they could get plenty of water there.

To the REFEREE:

I don't know where else it could come from if not from the lake. There are wells down the street a quarter of a mile that when you draw from that well you draw from those wells all around there. My brother has got a big well down in his barn, away down below there, and you draw from this well and it will draw back from there; so I don't see how it comes from the lake any more than lots of other places.

To Mr. BARROW:

The land slopes from this point to the north, begins to slope almost immediately. The street lies between, and from the street there is quite a rapid slope to the north a few feet slope to the creek. The creek below the dam about four hundred feet away isn't very much below the lake surface, eight or ten feet perhaps in low water. In high water it would be five or six feet more; depends on how much water there is in the lake. The first talk I heard about the construction of this new system of water works was to put a pipe into the lake. The contract shows that, I believe. And afterward
that talk resulted in talk regarding a well. The well is forty
86 feet from the north end of the lake, about that from the end
of the park; of course the park extends out into the lake,
about forty feet from the shore of the lake. Our pump-house is placed 275 feet north of that and across the highway, and along near the outlet of the lake, about half way between the lake and outlet, it must be about 250 or 275 feet from the outlet. I suppose the contractor pays the laborers who perform the work upon the well, John Marsden, of Utica, N. Y. We advertised the letting of the contract, had plans and specifications. I think there were eight bidders. I think I have the original bids, most of them. I don't know as I have all of them. I couldn't say I can get all of them; I can get part of them anyway. I can't remember the names of all the different bidders from memory; I can give you what I remember. N. B. Birdseye of Fayetteville, N. Y.; John Marsden; Dunfee & Belden & Dwyre of Syracuse; Eniton & Co.; D. G. Grannis; a man by the name of Thomas Regan & Co., I think; Rudiger;

Harter & Lewis. That is all I guess. I will produce the bids and records of them.

To Mr. TRACY:

There was no price fixed for this well. He was simply to go on and do the work. That is what I mean by its being done by day labor. I suppose what we would call a force account. The well is completed all but the cover, cap or stone or whatever it is. I should think it had been so since the 2d or 3d of January, 1897.
87 The engineer was there at the time it was being built, superintending the work.

To Mr. DILLON:

The land immediately north of the lake there is a stratum of clay there. I don't know that it slopes to the lake and forms a basin. I couldn't tell where it goes to. I know it slants that way, but I couldn't tell where it goes to. When they struck water at the well as I noticed I thought it came from the northwest side more. The board appoints an individual to take charge of certain parts of the work. Mr. Hall was appointed a committee to take charge of the well. Whatever directions the contractor desired he could get from Mr. Hall instead of going before the whole board. There was an analysis of the water of the lake made and from this well. Previous to the beginning of this well the water board had a driven well and a pump attached to it; and a sample of that water taken and a sample from the lake was taken to Cornell University for analysis. I couldn't remember what it was. I have it in my possession, but not here.

To Mr. BARROW:

This well was to be constructed by day labor but there was no contract price fixed for the well completed. It was to be constructed under the supervisiou of the engineer, I believe. The engineer was employed by the month so he didn't get anything extra for overseeing that; he didn't that I know of. If he did it seems we would have known it. There was nothing said about days' labor in
88 the contract for the well, just a force contract. By a force contract I mean his contract provides for a thing of that nature, or the original contract provided for it. That is all I know about it. There is some provision in the contract. I mean when I say force contract, in the written contract as I understand it.

The plaintiff offered in evidence consent of the superintendent of public works, which was received in evidence, marked Ex. 37, and is as follows:

OFFICE OF SUPERINTENDENT OF PUBLIC WORKS,
ALBANY, *Dec.* 16, 1887.

"Whereas the Skaneateles Water Works Company, a corporation duly formed and organized under and by virtue of the laws of this State, has made application for permission to take water from Skaneateles lake (said lake being a State reservoir for canal purposes) to supply the village of Skaneateles with water, and for no other purpose, and have filed in this office maps, plans, and profile of the route designated for their water pipes:

"Therefore, permission is hereby granted to said Skaneateles Water Works Company to take water direct from said lake through a pipe not to exceed eight (8) inches in diameter, by pumps from a pumping station, upon the following conditions and restrictions:

"1st. The water shall be so taken from said lake by pipes, from a pumping station as stated above, and shall be used for sup-
89 plying the inhabitants of the village of Skaneateles with
water, and for no other purpose. All surplus water and water not used by the said village of Skaneateles shall be returned and conducted into the feeder running from said lake to the Erie canal; and all costs and expense for the construction and maintenance of said water works shall be paid by said Skaneateles Water Works Company.

"2d. All work authorized by this permit shall be done under the supervision of the superintendent of public works or inspectors to be appointed by him; and the salary of inspectors for said work to be selected by the superintendent of public works shall be paid by said Skaneateles Water Works Company; and the work shall be done at such times as the superintendent of public works shall direct, and so as not to interfere with the free and perfect use of said lake as a reservoir for canal purposes.

"3d. Said Skaneateles Water Works Company shall be held liable for and shall pay all damages that may occur or arise, either to the State or to individuals, in consequence of the construction and maintenance of said water works.

"4th. The superintendent of public works reserves the right at any time to revoke and annul this permit and cause said Skaneateles Water Works Company to remove said water works at its own cost and expense from the limits of said lake; also the right on the part of the State of re-entry and reoccupancy of such
90 lands covered by this permit as the free and perfect use of
said canal reservoir at any future time may require, or as may be necessary for making any repairs, improvements or alterations in the same.

"5th. An acceptance by said Skaneateles Water Works Company of this permit shall be deemed a covenant for the faithful performance of all the conditions and requirements herein contained.

"In testimony whereof, I have hereunto set my hand and affixed the official seal of said office, the day and year first above named.

"JAMES SHANAHAN,
"*Supt. of Pub. W'ks.*"

CHARLES W. KNIGHT, being called by the defendants and examined by Mr. Dillon, testified as follows:

I reside in Rome, N. Y. My profession is civil engineer, have been engaged 25 years; I am head of the firm known as Stanwix Engineering Company. In 1889 or 1890 we prepared plans and

specifications for the Skaneateles Water Works Company, and made estimates for a plant to be located at Skaneateles village. It was to consist of a pumping plant, taking water from the lake, pumping to a covered enclosed standpipe, and about 29,000 feet of cast-iron mains, with hydrants, valves, &c. We fixed the number of hydrants; there were 46. The pumping station was to consist
91 of three rooms; a room for the pumps, one for the boilers
and another for the coal-room; an engineer's cottage; about 600 feet of suction pipe I believe, between 500 and 600 feet. I recollect making the soundings for the suction. I know the plant as constructed.

To Mr. Dillon:

We have made plans and specifications for the construction of a plant at Skaneateles village for the board of water commissioners of that village. And I know the cost and details of the plant.

Q. You may describe what it contains.

The plaintiff objected to the question as incompetent and immaterial; the objection was overruled and the plaintiff excepted.

A. It consists of a pumping station, taking water from a well, and pumping the same to a reservoir and distributing it through cast-iron pipes. There are 58 hydrants that covers all except the minor details of construction.

Q. What is the cost of that?

Objected to as incompetent, immaterial, and irrelevant; received, and the plaintiff excepted.

A. The contracts are in evidence as to that. I haven't it at hand; it is approximately $29,000. That is the estimated cost under the original contract. That included 2,000 feet of suction pipe, I think. From that you want to deduct 500 feet out of the 2,000; so
92 it would be 1,500 feet. There is a reservoir instead of a
standpipe. Its capacity I think is 500,000.

(Mr. Dillon: It is 355,000.)

Q. I will ask you if the reservoir is constructed of sufficient capacity to supply this system of water works, in your judgment?

Objected to as immaterial, irrelevant and incompetent and that the witness has already testified that he don't know what its capicity is. Objection overruled and the plaintiff excepted.

A. I think it is ample for all use and fire protection.

I don't know the exact difference in the height of their standpipe and our reservoir.

Q. How far has this plant been constructed both as to material and cost, (Feb. 12, 1897)?

Objected to as incompetent and immaterial; objection overruled and exception to plaintiff.

A. I haven't got with me the details in feet.

The well has been completed; between two and three miles of pipe laid. I don't recollect the number of hydrants; the reservoir is nearly completed except the gate-house; the pump-house is under way. I think the engine has not been put in. The cost up to Jan. 1, that is our last estimate of the contract work is $12,266.63, and the well $581.92, engineering $625. I don't think there is quite half of it done, about half; there is not quite half of it done.

93 Being cross-examined by Mr. Barrow, he testified:

I think work was commenced upon this recent contract, the last contract, about the 17th October, 1896, 17th or 18th. I can't give you the date when the first pipe was laid. Ground was broken for laying either the last of October or fore part of November; I don't know whether any work had been done at the time of the commencement of this action. The first work was done on the reservoir. The original plan and specifications which were drawn by me for the village provided for an intake pipe running into the lake about 2,000 feet; and that part has been discarded and a well substituted on the shore of the lake; built under my supervision. It was constructed by sinking a brick curbing and pumping out the gravel, sinking it down into the water-bearing gravel. It was the water-bearing gravel through which this well was sunk; and pipes and openings put through the brick wall; so that the water might come through the gravel into this well. These openings stretch up from the bottom up very near 20 feet. No, not so much as that; about 17 or 18 feet, I don't know exactly; all around the well; the same number upon all sides. From recollection I think the depth of the well is about 29 feet. Its diameter is about 8 feet. These openings that I speak of are about an inch by two inches, most of them. There are a great many of them; and a great many pipes.

94 The capacity of that well varies with the material surrounding the well and the amount of water in that material. The capacity of that well to the flow line is about 660 cubic feet. That would be about 5,000 gallons. The flow line varies a little there. It was the line the water rose to when we were constructing the well. It is about 4 feet lower than the level of the lake. At the time we observed the flow line. I did and I did not recommend this change from a suction pipe to a well. I recommended an experiment. I thought it best to make the experiment. I didn't have much hopes of its success. The experiment was made; I don't think I have been called upon to pass. I have never made and recommendation. This well is placed about 60 feet perhaps from the lake shore. The well wasn't substituted for the pipe after an experiment made to determine whether water would come into this well from the lake. The well itself is the experiment. We made no experiment. Oh, there was a little driven well there to be sure. Somebody drove a well down to see if there was water in this gravel, yes. By some members of the board of water commissioners it was not the plan, the idea of the scheme that water would be supplied to this well from the lake itself, but it was my supposition it would come from the lake. I couldn't say what the experiment developed. It is four feet below the level of

the lake and sixty feet away. I couldn't say whether it comes from the lake of not. I heard a good deal about a gravel vein that existed there and caused the Syracuse water board a 95 good deal of trouble, supposed to be full of water. This well was sunk there for the purpose of getting water from the lake. That is what we sunk it for of course; oh, to get water from the lake. It was not expressed as the opinion of the board of water commissioners that it was by percolation. I don't know with the idea that water would come to it, be supplied to it from the lake. I have stated what the idea of the board was; that they would get the water independent of the lake.

Q. Do you think as an engineer that a well dependent simply upon natural surroundings, independent of the lake, of the capacity which you have named as the capacity of this well, is a sufficient supply of water for a village?

A. It depends upon the inflow of the lake; the size of the well has little or nothing to do with it.

Q. Do you think as an engineer that a well dependent simply upon natural surroundings, independent of the lake, of the capacity you have named as the capacity of this well is a sufficient supply of water for the village, under ordinary circumstances, leaving the lake out of consideration?

A. From our tests the three tests?

Q. I am speaking of an ordinary case, not the tests you made here.

A. From our observation of the lay of the land.

Q. Yes; supposing there was no lake there?

A. Oh, I couldn't tell without testing it.

Q. Would you have advised the construction of that well if it had not been in colse proximity to the lake?

A. I would not, except from a test.

96 Q. And you had no test?

A. The well itself is a test.

Q. But you had no test before the well was constructed?

A. No; the well was constructed for a test.

Q. You would not have advised even the making of such a test if it had not been in proximity to the lake?

A. If we had no other source of supply we would have to make some tests to determine what our plan would be. Our plan involved a suction pipe into the lake and we substituted this plan of a well for it.

Q. Would you have made that test if that lake had not been in the neighborhoood?

A. Certainly before we would have recommended the line of work we would have had to make a test.

Being re-examined by Mr. Tracy, he testified:

The well was practically completed on Jan. 1; there was a little grading, perhaps half a day's work for two men to do and the covering to be put on, at that time. The cost up to that time was $581.92. The additional cost of grading and putting the cover on might be

$25. There is nothing whatever to prevent, if this well failed, running a suction pipe out into the lake as originally proposed. At an expense based upon our estimate of the original cost of about $2,400 perhaps to go out from there to the extent that we intended going out, 2,000 feet.

97 The well is a brick well built on a shoe. The shoe is made partly of iron and partly of wood; and the shoe itself is bolted to the brick-work on rods run up through the brick-work and anchored in under about six feet. It is built of cement and lowered as we make the excavation and went down; and it tapers slightly from the bottom to the top and drawn in to form a manhole at the top, over which there is to be a cover. As the shoe went down the brick-work was laid on top of it. There were pipes in the brick-work, and also holes left. There were a good many small pipes put in there through the holes, and there were some tiles put in; part of the way it was holes, an inch to two inches, and some places it was tiles. At the time it was completed I can state approximately the amount of water that came into the well. We built a weir and pumped over this weir and we kept a record from day to day of the amount flowing over this weir; and the quantity is about 750,000 gallons in 24 hours. That is a maximum. The original capacity of the pump was 750,000. I know about the amount of water that the village of Skaneateles about 2,000 inhabitants, consumes in 24 hours from experience and observation. I know what is ordinarily consumed. The amount of water that a village of the size of Skaneateles consumes varies greatly; 50 gallons up to 100 *per capita.*

By Mr. Barrow:

Q. In your opinion could you have pumped 750,000 gallons
98 in 24 hours from that well if the water had not come to it
from the lake?

A. Percolation is very slow, percolation into that well. It may come from the lake. I don't know where else it could come from.

Q. In your opinion could you pump 750,000 gallons of water in 24 hours from this well, unless the water, taking all the surroundings of it, come from the lake?

A. In my opinion could that amount be pumped unless it came from the lake?

Q. Taking all the surroundings there?

A. I hardly think it could; I don't know. It is a question I don't know without more testing than we have done.

Q. Have you any opinion on the subject?

A. I said I don't think it could unless it came from the lake; but I couldn't state positively.

Q. But you don't think it could unless it came from the lake?

A. No, sir.

To Mr. Dillon:

It is here conceded by the plaintiff that the land upon which this well in question is sunk is owned by the village of Skaneateles, and that that land borders on the lake.

By Mr. TRACY: It is conceded that the land bordering the lake, where the suction pipe would be run into the lake if it was used, is land belonging to the village.

Mr. BARROW: The village owns a park, and this well is upon that
park. I should think the frontage of this park on the lake
99 was 200 or 300 feet. It is a strip of land owned by the vil-
lage on the shore of the lake.

The defendant offered in evidence a certificate from the comptroller's office, which was objected to by the plaintiff as incompetent and immaterial; the objection was overruled; the paper was received in evidence and marked Ex. 38, and is as follows:

"STATE OF NEW YORK, } ss.:
Comptroller's Office, }

"I, James A. Roberts, comptroller of the State of New York, do hereby certify that I have made diligent examination of the minutes of the proceedings of the canal board on file in my office, from August 1st, 1887, to this date for a resolution or authority in writing to the superintendent of public works, purporting to authorize him to consent to the use of the waters of Skaneateles lake by the Skaneateles Water Works Company, the legal custody of which belongs to me, and that said resolution or authority cannot be found.

"In witness whereof I have hereunto set my hand and
[L. S.] official seal this 11th day of February, 1897.

"JAMES A. ROBERTS,
"*Comptroller.*"

Mr. Barrow objected to that part of Ex. No. 38 which states that
"the legal custody of which belongs to me." The objection
100 was overruled and the plaintiff excepted.

Defendants here read in evidence from the deposition of E. Norman Leslie, a witness for the defendants taken at his residence in the village of Skaneateles, on February 11th, 1897, as follows, he being unable to attend before the referee on oceount of sickness.

E. NORMAN LESLIE, being sworn and examined by Mr. Dillon, testified:

I reside in the village of Skaneateles. I think I have resided there over 40 years. At present am president of the village and one of the defendants. I have had some correspondence with J. W. Hawley president of the plaintiff corporation. (A letter dated Medina, Pa., Feb. 7, 1895, was read to witness.) On or about Feb. 5, 1895, I wrote to Mr. Hawley a letter to which this is a reply. I retained no copy of it. As to the contents of that letter—the first thing was that the business between Mr. Hawley and the trustees should be conducted on business principles. I think it was distinctly stated that the trustees would extend the contract for one year on the same terms, to wit, $30 for each hydrant for one year, and the object is to purchase the plant. I explained to him that the tax-payers did not amount to as many as he thought they did.

The plaintiff here read from said deposition the cross-examination, as follows.

101 Being cross-examined by Mr. Barrow he testified:

I have not a very clear and distinct idea of the contents of the letter I wrote to Mr. Hawley. I think it was substantially as I have stated. I am not sure that I said in that letter that the trustees would extend the contract for one year. I did not ask in that letter if the company would extend this contract for one year. I did not ask any such question. I do not think I ever asked the company to extend that contract. I think if I was to be positive I did not. I never asked the company or any officer of it, to furnish water to the village of Skaneateles for any purpose on any terms. I was never directed by the trustees to request the Skaneateles Water Works Company to furnish water to the village of Skaneateles for any purpose on any terms. I have no knowledge of the passage by the trustees of the village of Skaneateles of any resolution authorizing a contract with the Skaneateles Water Works Company to supply the village on any terms. I don't know of any request having been made of the Skaneateles Water Works Company by me or any person authorized by the trustees to supply the village with water on any terms, excepting the proposition that I made to extend the contract for one year for the purpose of ascertaining whether the plant of the water company could be purchased by the village. The idea was to purchase the plant. I was never in favor myself of entering into a contract with the company of any kind. I was in favor of a contract
102 for one year on the old terms. What I mean by the answer to the previous question is I supposed that was in a different line. I didn't mean that I was fully in favor of extending the old contract for one year. I was not in favor of any other contract with the old company besides that. I remained in favor of extending the contract for one year until I received Mr. Hawley's letter of Feb. 7, 1896; even afterwards as we did not want to have a fight with that company. I continued being in favor of making a contract of one year with the old company until I received that letter. (Witness' attention was called to a letter printed in the Skaneateles Democrat March 5, 1896.) The title of that article is "The only question now is municipal ownership of the water plant." I say in that article: "I am heartily in favor of continuing the present condition, of not making a contract with the water company." That was my feeling at that time, has been ever since. I can't say that I have been unfriendly to the Skaneateles Water Works Company since it commenced operations. I can't say that at any time I was friendly to them. I know nothing about them. I think there was a contract made by the trustees with the water works company. I don't know that I heard of it at the time. I remember signing a petition asking trustees to submit the question to a vote of the tax-payers. I didn't draw it, but I signed it first. I wasn't instrumental in getting it up; nor in getting signatures for it. I can't tell at whose

solicitation I signed it. I don't think I wrote any article in
103 the papers on the subject at that time, advocating the prayer
of that petition. I have rather felt that we didn't require any system of water works in Skaneateles. I didn't think we needed it. I wouldn't have favored municipal ownership at that time. I have never taken water from the Skaneateles Water Works Company.

The defendant here read the redirect examination of the witness from said deposition as follows:

I didn't take water from the old company because I have water in the house already. I have a cistern that holds 60 hogshead- of water, rain water from a slate roof, and a hot-air pumping engine in the cellar that cost me two hundred dollars, that pumps the water from the cistern to tank in garret that holds 30 barrels; from there it is distributed to second floor. All this I had before the water system was in.

My recollection of my letter to J. W. Hawley is I said that the trustees would extend the old contract for one year for the purpose of ascertaining whether the plant of the Skaneateles Water Works Company could be purchased, and if it could not be purchased as I think I stated, the people of Skaneateles were in favor of municipal ownership. I explained to him the vote of the tax-payers, showing that the tax-payers were far less in number than he expected, and stating that there were 80 female tax-payers who could not vote;
that any business that the village might have with the water
104 works company would be done on business principles. I was
guided more or less by that vote of the tax-payers. That election was called at my own suggestion. I did that immediately after receiving his letter in which he stated he could not renew the contract at $30 per hydrant. At that time I was in favor of renewing the old contract for five years, or for any number of years.

The plaintiff here read from said deposition the recross-examination of the witness as follows:

That vote that was taken on the question as to whether we should renew the contract at $50 per hydrant was taken somewhere in the village. I was there. I voted. That proposition was submitted by my suggestion. I didn't solicit and obtain votes against it. I don't recollect that I talked against it. I say I have always been in favor of renewing the old contract for five or more years at $30 per hydrant. I don't recollect of ever making a statement to any one connected with the old company that I was in favor of that renewal. I say I did not I have not had a great deal of correspondence on this subject; I have had some; written four or five letters. I have written communications to be published in the Skaneateles Democrat. I have never until now publicly expressed myself as being willing to renew the old contract with the Skaneateles Water Company for $30 per hydrant. I can't recollect the name of any person to whom I have expressed myself as being in favor of such renewal.

105 **James A. Root**, being sworn for defendants and examined by Mr. Dillon, testified:

I saw Mr. Hawley once, president of the Skaneateles water works, when he came up here at our request to have a conversation with him. I had conversation with him. It was the latter part of May, I should think, or the fore part of June as near as I can recollect, of 1896. The water board requested him. We met him at the water board's office in the engine-house at Skaneateles. We had a conversation with him at that time for two hours. An attorney was with him, to whom he introduced us. I can't recollect his name; from Media, Pa., we had a conversation in regard to the sale of the plant. That was after the election. Before we had advertised or concluded to construct a water plant.

Q. State that conversation?

The plaintiff objected to the question as being incompetent, immaterial and irrelevant; the mere declarations of an officer of a corporation. The objection was overruled and the plaintiff excepted.

A. We had a correspondence. He came there with his attorney and we asked him what he would take for the present plant that was in there. He said that we had not in our condition enough to buy it. We had bonded for only $30,000 and that would not purchase the plant. We continued the conversation and wished that he would state some price. We asked him to state some price.
He stated that it was bonded in the first place for $40,000,
106 that that would have to be paid for at par. That there was
a second bonded indebtedness of $10,000 and that we would have to purchase that. Then there was the stock, he didn't mention how much, that it would be necessary to pay, he wouldn't say how much for that. He stated that he had paid one of our citizens $2,000 for his $10,000 of stock; he couldn't lose that. That citizen was Mr. Hall; he mentioned his name. He stated that he could not tell how much it could be purchased for and declined to state any price. When he left us, the president of our board, when he was about leaving the room, got up and urged the matter more strongly, and asked Mr. Hawley to state where he would be, his post-office address, so that we could continue this negotiation. That we wished, if possible, to purchase the old plant at some fair price and to avoid putting in one ourselves. Mr. Hawley replied that he did not know where he should be. It was left there. The president of our board, Mr. Lemual Hall, said to Mr. Hawley he would hear from us afterward in regard to the plant, that we should make an effort to negotiate for the purchase of the plant. After this time our board met; at the meeting of our board after that we consulted together and among ourselves decided to make an offer. We offered him $24,000 cash for the old plant. The board employed an engineer to make an estimate of the value of it. We made this
107 offer after we had procured an estimate from the engineer.
I think it was this man here in Syracuse that made it, Mr. Higgins. I don't know whether we had more than one estimate. I

should call the paper now shown me the estimate that he made at that time.

Marked for identification Ex. 39.

Being cross-examined by Mr. Barrow, he testified:

We talked with Mr. Hawley upon the occasion I speak of about two hours; most of that time we were talking about the value of this plant. A great deal was said upon that occasion which I have not given, of course there would be. I have given only a small part of what was said in that two hours. I won't say that Mr. Hawley told us that he had no control. He stated that these bonds that were issued were widely distributed and owned by different parties; that he had no control over the bonds. He said that he considered they could be purchased or brought in; that he had a measure of control of them. He stated that they were widely distributed among different parties. I think he stated that all he owned was the stock, all he was interested in was some of the stock. And upon that he put no price at that time. When we asked him where he was going to be and I say he said he didn't know where he was going to be, I don't recollect that he told us he was going to Europe at that time. I wouldn't say he didn't say that. We subsequently did cause a letter to be written to him upon this
108 subject, and that letter made an offer to him. It stated a
price, $24,000. A letter that was written to him stated the price, $24,000, as what the village would be willing to give, or the commissioners. I think the secretary of our board Mr. Shultz wrote that letter. I never saw it. We authorized our secretary to make that offer. I never saw the letter. The secretary is J. L. Shultz. I could not say of my own knowledge of its being sent, but it was reported to us as a board. He stated that there was no use in talking for we hadn't money enough to buy the plant. The money he referred to was the $30,000 that had been voted. I did not understand by that that the village didn't have money enough to buy the plant, wasn't rich enough. I wouldn't say that we understood by that there was a refusal to sell on any terms, but simply that $30,000 was not enough. It was not my idea always that the company should take what we thought was the value of this property. We should not have offered the $24,000 if we had only offered what we thought the plant was worth to us. For the sake of peace we offered more than we thought the plant was worth. We could not estimate the plant was worth to us over $15,000. We offered about $9,000 more than it was worth as we thought. I was always opposed, myself, to condemning this property or acquiring it in that way on account of the expense. At the meeting at Library hall you (Mr. Barrow) I recollect offered to pay all the expenses of the condemnation proceedings if we
109 would condemn excepting our attorneys' fees. The objection
was made there at that time to the expense of condemnation proceedings, and that you stated in reply to it. I signed the petition that was presented to the trustees. I recollect a petition that was presented asking them substantially not to enter into a contract

with the company away back in 1889; we felt the price was too high. I was not active in getting up that petition. Before that I was active in raising objection to giving away the franchise. I was not opposed at that time to a water-works system; I felt as though the village needed it, but should own it ourselves. I did not carry that paper around and get signatures. I did not go and talk with people and ask them to sign it. When I talked with Judge Marvin or asked him to sign it was before that, not that particular paper. I will say that I was opposed to giving so much $30, for a hydrant. I was not opposed to giving anything. I have not always been unfriendly to this company from the start; I was opposed to giving away the franchise in the first place. That did not make me unfriendly to the company because they afterward did do it, in the strong sense of the word. I have said good words for this company. At various times, I thought they were doing a very good service to the village. I have not said that often because I have not thought so many times. I have not said so then sometimes when I have not thought so; I will give, as I say, the devil his due. It
110 was true as far as I said it. When I said I thought they were doing a good service for the village I meant it; not the full extent. Mr. Stephens of the Free Press uses the water there to run his press. I thought they were doing a very good thing in furnishing motive power for him. That is one of the things I said. There might have been something else I said in favor of this company. I thought it was a good thing to have the fountain there, but I didn't feel it was a good thing to pay so much for it. I was glad to see water in our fountain. I will say that I was fairly satisfied with the accomm-dations and so on until they raised on the price. I think Mr. Hawley at that time said also that what we should pay for the stock he would leave to us. He said he could not give away the stock. He said he had paid $2,000, but I think he said he would leave to us what should be paid for it.

Being re-examined by Mr. Tracy, he testified:

The reason that we put the price or value as low as $15,000 was because it was cement pipe, the pump-house was not where we wanted it; we should have to build a new pump-house; the standpipe was not what we needed; it didn't hold enough to supply the village twenty-four hours with water, if used freely. There was altogether too much small-sized pipe; it didn't cover all the streets; we should have to extend it. There were many buildings that were not
111 protected from fire which had to pay taxes; Mingo Lodge, for instance, had to extend their works themselves. The house of James A. Root is another. I had a right to protection, which I had not. I paid taxes and never had any benefit from those taxes in the way of fire protection. Previous to this time I had known of the condemnation proceedings in Syracuse as to the outlet and the water works there. It was on account of the expense that we refused to enter into condemnation proceedings. We were willing to enter into proceedings for the condemnation of

property with the agreement that the other side should pay the expenses and the commissioners' fees.

Q. Do you mean you were willing to enter into a lawsuit with the other side to pay the fees of the referee?

A. I don't know as I understand the question.

Q. Mr. Barrow testified that he offered to pay all the expenses of the condemnation proceedings, including the fees of the commissioners. Were the water commissioners willing to enter into a lawsuit, a litigation in condemnation proceedings where the other side was to pay the fees of the commissioners?

A. I prefer not to answer that. I would say if the court would permit——

By the REFEREE:

Q. You stated that Mr. Barrow made a proposition to pay the expenses of the commission with the exception of your counsel. Were you, as a member of the board, willing to enter into that arrangement? 112

A. We knew——

Q. Were you willing as a member of the board?

A. Why, I was willing to pay a good, liberal sum for the old plant—(ordered stricken out).

Q. That is not what I asked you. You understand the question, don't you?

A. I don't know as I do, because I am not familiar enough with law to know the full expenses.

Q. Your opposition to condemnation proceedings was based upon what you thought might be extravagance in the fees of the commissioners and counsel, was it not?

A. If the court will permit, I will.

Q. No; never mind that. You were opposed to condemnation proceedings by reason of the expense attendant upon it?

A. I was.

Q. Mr. Barrow, you say, made a proposition to you, as an officer of the village, that he (representing the old company) would pay all the expenses incidental to the commission with the exception of the fees of your attorneys. Were you agreeable to accepting that proposition?

A. Why, at the time I didn't feel I was ready to accept of that.

By Mr. TRACY:

Q. On these condemnation proceedings you had learned that a very large amount had been allowed in the city of Syracuse for a system where they had cement pipe to some extent.

Objected to as immaterial and irrelevant.

The REFEREE: I think we have got about all the witness knows about it.

113 Mr. TRACY: I understand he was opposed because very large amounts had been allowed in condemnation proceedings also, that is all I care to prove about it.

The Referee: Do you object to it?

Mr. Barrow: No.

By Mr. Tracy:

Did you object to these condemnation proceedings on account of the large amount that had been allowed in the city of Syracuse where a system had been condemned on the same plan?

A. We did; we judged from what had been done here that it was not safe.

By Mr. Dillon:

Q. Not safe to put the village in that position?

A. Not safe to put the village in that position. It was not because we were not willing to pay a reasonable price for the old plant.

Re-examination.

By Mr. Barrow:

I wouldn't say that the reason why we were opposed to that was altogether that we were afraid that the amount awarded would be more than the value of the plant, more than our idea of the value of the plant. That was not the principal feature of it. A just award we were willing to pay. I would not say altogether that what we were afraid of was that we wouldn't get a just award. We
were afraid if we let it go that way judging from our experience
114 in the Syracuse matter that it would be too much.
I have lived in Skaneateles 42 years. The Kelly boys complained it wasn't laid up their street. It was not laid on East Austin street; the extension was not made on West Lake street. It was not laid on East Elizabeth street on the south end of West Lake street. I don't know what the name of that street is that runs by where our reservoir is. It was not put there. Will Chave is in our village; he has no protection. Mrs. Baker complained. That is a continuation of Cross street laid on one section of Cross street. The extension of Cross street where it is laid is longer than the principal street. In East Seneca street; it was not laid up by Mr. Fibbins. Up Cross street, up toward the Beaver place there are three houses on Onondaga street, there are three houses. I should say it was forty rods to Mr. Chave's on Onondaga street. On East Austin street 8 houses; oh, I was thinking of West Elizabeth. Upon East Austin street where this plant is put in there are 3 houses. The street was 8 or 10 rods long, three houses fronted on East Austin street. East Austin street was laid out when this plant was put in. I say it was not laid on East Elizabeth street. I wouldn't say there are no pipes on East Elizabeth street, the extension on East Elizabeth street. It is laid there, a part of East Elizabeth street. The part that I say 8 houses are on, where no pipes are laid is the
part that lies between Syracuse and Leach avenue, Elizabeth
115 street. There are only three houses. The pipe does not run
all through the street, but its runs in the east part of East Elizabeth street.

Redirect examination by Mr. DILLON:

There is no pipe at all on Austin, commencing at the Catholic church and going down that street to the bolt shop there is no pipe at all. There is a good number of houses on that street; both sides of the street. There is no pipe on West Elizabeth street west of the railroad. There is none on Griffith street. Austin street has been laid out a great many years.

Being cross-examined by Mr. Barrow, he testified:

I have heard or known of requests being made to this company to lay pipe on those streets, and its refusal to do so. I wanted it laid up by my house, up nearer to give me fire protection, as an extension on Genesee street. I know of no other than that; I let others take care of themselves. I have made a request that the company should lay pipe to my house for fire protection. That would be a thousand feet from the end of their line, and there is no house between me and that line. The cemetery wants it right opposite; they want water.

To the REFEREE:

116 When Mr. Hawley left Skaneateles I was convinced from the conversation I had with him that we had not sufficient money out of the $30,000 in bonds to purchase this plant, from what he said to us; he told us plainly twice. When we wrote to him, or caused the offer of $24,000 to be made we believed he would consider that proposition notwithstanding what he had said when he left us. We were open for negotiation, if we had received a reply to that letter. One of our board wrote there to see if they had received that letter and they had. If we had received a reply to that letter we would have paid him more, than not to have got it.

I have no doubt we would have paid him the full $30,000. That was the only offer we ever made to him.

WARREN C. DE WITT, being recalled and examined by Mr. Tracy, testified:

This paper which you show me is the amended contract for the construction of the water works of the village that I mentioned the other day for the construction of the pump-house. That amends the other contract in some way.

Offered in evidence by defendant; received and marked Ex. 39.

117 In the original contract the bid of Marsden for the pump-house was $5,000. The board decided they could get one with a cheaper pump-house and made this contract. It relates to the pump-house. Practically that was all there was except the well. The well was made instead of going into the lake. That change was made.

Q. What is the total cost of this work, under these contracts, of putting in the well and any other changes that have been made?

Objected to by the plaintiff upon the ground that it is immaterial; objection overruled; exception to the plaintiff.

A. Mr. Marsden's original contract for what work he took the way it was let to him originally, was $21.260. That was of course cutting out the pump-house and the intake pipe to the lake. The contract for the pump-house is $2,800. The cost of the well I could not swear to, but it is $868. I am quite sure and come cents. The suction pipe additional will cost, that is Mr. Marsden's estimate if it, what he agrees to put it in for, provided they shall see fit to give him that is $835; that makes a total cost of $25,763. There was about $240 to $250 saved on the reservoir; some less work done there, less than the contract, that would be deducted from this price. There has been land bought for the purpose of establishing these works. The Baber property, cost $500. And then there was property bought of Joseph Stott or Caroline Stott, for I think $450; $400 or $450. And then afterward the McCarthy property where the pump-house is, was bought for $450; that is the property.
118 And then there was an heir to the property that came in and she wouldn't release her claim, and they gave her a hundred dollars more for releasing her claim to the house, property and all. That is not included in the $25,000. I don't know exactly about that reservoir to a dollar, but I thing $250 within a few dollars anyway; deducting that and adding the land that was purchased it would be $26,963 total cost, including the land and everything.

Being cross-examined by Mr. Barrow, he testified:

That does not include anything for the expense of the commission, nor for counsel fees, nor to any engineering expenses. I have brought you the bids and have them here. All the bids were made on the same plans and specifications. Afterward some of it was cut out and we take that out of their total bid. The bids were let upon the same plans and specifications. The lowest bidder was M. B. Birdseye of Fayetteville, N. Y., on the amount of work that was let on that day. Taking it if the contract had been let that day for the whole amount. I don't think he was the lowest bidder in that way; this being stricken out, that is all. Every bid was put in regular, and they were stricken out in each bid, before they bid. So that when they bid they bid on the same thing. After they bid there was no change in the plans and specifications before the contract, none that day. Afterward the contract was let to Mr. Marsden. Mr. Marsden was the next lowest bidder; he came next to Mr. Birdseye.
119 The difference between them was about $100. The lowest bid, Mr. Marsden's bid was $21,260, I think, and according to this Mr. Birdseye's was $21,028.99. The difference is $231.01. The reason why the contract was not let to Birdseye was stated at the meeting that the Worthington people were to furnish the pump; and he said simply that if the lowest bidder, he didn't mention any name, but if the lowest bidder was to have the contract, that he should feel it his duty to have the commissioners guarantee payment of the pump; and they thought if that was the case they would prefer to let the contract to a responsible party. The Worth-

ington people, Alburger or some such name, made this statement; Birdseye didn't make it. Birdseye had nothing to say about that. That is the only thing I ever heard of. I never heard anything about a deal between any of these commissioners and Mr. Marsden. I could not say I have not heard it suggested on the street, but that is all.

To Mr. DILLON:

The notices for bids prescribed that each person who bid, should deposit a certified check with the water board for $500, payable to the order of the Skaneateles water board or the treasurer; Edward Eckett, treasurer, it seems to me, I don't think Birdseye complied with that, but I have forgotten positively. It was made payable to his order and was not endorsed; it was not of any use to the
120 water board, they could not recover on it. The plans and specifications contained a provision that the water commissioners should have a right to reject any and all bids.

Mr. Tracy offered in evidence deed of J. L. Clift to Village of Skaneateles, May 2, 1887, recorded May 10, 1887, in the clerk's office of Onondaga county, conveying the property that the village owns on the shores of the lake. A brief abstract of description.

GEORGE BARROW, being recalled by the defendants for further cross-examination by Mr. Tracy, testified:

I procured the consent of the superintendent of public works to take the water of the lake for the plaintiff. No compensation was paid to the State or anybody for this consent. The plaintiff purchased from Mr. Mason a lot of land on the lake. I presume that is all of the land described in the mortgage in evidence, the mortgage of the Skaneateles Water Works Company. It is the same lot of land described in the mortgage. The plaintiff had a deed of that land. It was purchased and the deed delivered between 1887 and 1890.

It is conceded that the plaintiff and the village have each acquired title to the land on the lake shore of which evidence
121 has been given; that they are owners under and by virtue of conveyance under a patent granted by the people of the State, of premises embracing those lands prior to the year 1830.

Mr. Tracy offered in evidence the petition for that is the application for the franchise granted to the plaintiff to establish water works.

Mr. Tracy also offered in evidence a map of the village of Skaneateles for the purpose of showing the extent of the village land on the lake shore.

Either party may produce such map on the argument of any appeal herein.

Mr. Tracy for the defendants offered in evidence the water commissioners' resolution directing the officers of the board to ask the officers of the village to call the water election, which was received. Ex. 41½.

He offered in evidence the certificate the result of the election dated May 9, which was received and marked Ex. 43.

Witness being shown a paper marked Ex. 43 testified that he served copies of that paper on Mr. Eckett and on Root, Shultz and Hall personally.

Defendants rest.

122 It is admitted by the defendants that the Skaneateles Water Works Company owns property situated on the lake shore that goes down to the lake.

It is admitted by the plaintiff that the lake is used as a feeder for the Erie canal.

Henry T. Beach, being called as a witness for the plaintiff, and examined by Mr. Barrow, testified.

I am a civil engineer; have been in active practice about 28 years; reside in Syracuse; have visited Skaneateles recently, made a map of the streets of the village of Skaneateles, made from what is known as the village map, a tracing of the streets. I have it with me. It shows the streets of the village, shows the location of the hydrants of the Skaneateles Water Works Company. The black dots that are indicated on the sides of the streets are hydrants. It shows the location of the pump-house of the water works company, the rectangular black spot on the east side of the lake. It shows the location of the standpipe; the heavy circle is the standpipe; near the east boundary of the village. It also shows the outlet of the lake. It shows the location of the well that has been constructed by the village of Skaneateles; it is the red circle near the outlet, a little west of it; that represents the location of the well. I have examined and am familiar with the topography of that section of country. 123 I have been there several times and examined it generally, especially in the vicinity of this well. It stands about 100 feet from the dock, taking that as the shore. But the water approaches within perhaps forty feet on the east, also on the edge of the dock. But in line with the well, on the line of the street, it is practically on the shore of the lake; that is, the north-and-south line. There are docks built out beyond it. This is a little further to the east; the lake there comes up to the same east-and-west line. I should describe it as being on the shore of the lake. I should judge that to the south and east of this there had been filling in there, apparently docks built and material filled in. The land lies practically level to the west of this well, toward the west; I should think for two or three hundred feet. And to the north there is a slight rise in the surface, for perhaps 100 feet, and then it falls away quite rapidly toward the outlet; that is, a rise until you get across the street and perhaps a little beyond, it is a slight rise; and then falls to the north, to the outlet. Upon the east it falls a little toward the outlet, although the ground is probably filled up there so that it is practically level. And beyond the outlet the street is practically level for some little distance; maybe a slight rise toward the east; not one that is very perceptible. We took elevations of the water in the well and in the lake. The water was four feet and 8 inches below the level of the water in the lake.

124 Q. Assuming that a weir measurement of the water coming into this well has been made, and that 750,000 gallons have been pumped from it in 24 hours, and taking in view the lay of the land about that well; what is your opinion as to the source of the water which comes into it?

A. I should say without any doubt the water came from the lake.

The map produced by this witness was offered in evidence by the plaintiff; received and marked Ex. 40.

Being cross-examined by Mr. Dillon, he testified:

I made this tracing the latter part of last month, the 22d of January. I got the map that showed the location of the hydrants from Mr. Barrow. I located the hydrants only from a map. I didn't count them; they are shown on the map; I have not counted them; merely checked them off as I copied them to see that it was a perfect copy. Practically this map depends upon the correctness of the map that was shown to me as to the location of the hydrants.

George Barrow, being recalled and examined by Mr. Hawley testified:

The trustees of the village have never made application to the water company to my knowledge for any extension of the mains.

125 George Barrow, being recalled and examined by Mr. Tracy testified:

I have lived in the village of Skaneateles ever since I was three months old. For a number of years the State has maintained a dam there at the outlet where the water flows out of the lake. And the water from time to time has been discharged from the lake through this dam and through the outlet into the canal. And that has been so probably since 1843; since my earliest recollection. The dam that is there has been under the authority of the State, and the State has kept a gate-keeper there since 1875 or about then. And he has regulated the flow of the water from the lake and at times he has closed the gate so very little water flowed from the lake.

Being examined by Mr. Hawley, he testified:

During all that time as a general thing water has been allowed by the State gate-keeper to flow down the outlet during the season of the year when the canal was closed in the same quantity. And when the water has been shut off by the gate-keeper, the proprietors of the mills below, on the outlet, have filed claims against the State. And they have in many cases recovered awards. And claims of that sort are now pending before the State court of claims.

Mr. Tracy put in evidence the summons and complaint in a prior

126 action, which it was conceded was commenced Sept. 9, 1896; that the original answer was served Oct. 20, 1896; an amended complaint was served Oct. 31, 1896; an order to the amended complaint was served Nov. 23, 1896; and that the summons and complaint in this action *was* served Oct. 29, 1896; and the answer in this action Nov 23, 1896.

Summons and complaint hereto annexed, marked Exhibit 45.

Mr. Tracy for the defendant-, offered in evidence the temporary injunction granted in said prior action begun Sept. 9, 1896; marked Ex. 43.

The evidence was here closed.

DEFENDANT'S COUNSEL: I move that the plaintiff be nonsuited upon the same grounds upon which our motion was made at the close of plaintiff's evidence.

Thereupon the referee, having reported in favor of the defendants, and the plaintiff having filed exceptions to his report, and having appealed from the judgment entered thereon, makes this case and exceptions, which with the exhibits thereto annexed contains all the evidence given upon the trial of said action and all the other proceedings upon said trial, to which is to be annexed the notice from said judgment, the judgment-roll and the plaintiff's exceptions to said report.

GEORGE BARAROW,
Plaintiff's Attorney, Skaneateles, N. Y.

127 *Exhibits.*

(Any exhibits not herein printed in full may if desired be produced to the court upon any argument herein by either party.)

Ex. 1, plaintiff's franchise, is as follows:

"SKANEATELES, *July* 5, 1897.

At a special meeting of the board of trustees, held in the fireman's room in the Shear block on the above date to consider the water question. Present, J. Allen, T. Kelley, M. C. De Witt, trustees.

In the absence of the president, W. G. Elery, Thomas Kelley was appointed president *pro tem.*

The following petition was presented to the trustees of the village of Skaneateles and to the supervisor of the town of Skaneateles, constituting the authorities of said village, according to chapter 213, of Laws of 1881.

The undersigned having organized for the purpose of forming a water works company to supply the village of Skaneateles and to the inhabitants thereof pure and wholesome water, hereby represent and set forth

First. That the persons who propose to form such company are John E. Waller, George H. Wicks, Lewis B. Fitch, Edwin E. Hall, John K. Knox, John McNamara, Benjamin F. Petheram and George Barrow.

Second. That the proposed capital stock of said company is forty thousand dollars.

Third. To be divided into four hundred shares of one hundred — each.

128 Fourth. That the source from which water is intended to be supplied is Skaneateles lake in the State of New York, and the authorities of said village are hereby requested to consider this application to supply the said village and the inhabitants thereof with pure and wholesome water. On motion of M. C. De Witt, sec. by J. Allen, the following resolutions were adopted:

Resolved, That the application of John E. Waller, George H. Wicks, Lewis B. Fitch, Edwin E. Hall, John K. Knox, John McNamara, Benjamin E. Petheram and George Barrow, bearing date this 5th day of July, having been duly considered it is hereby determined that such application be and the same is hereby granted, subject, nevertheless, to the conditions following:

First. The company to be formed under the authority hereby conferred shall have its works in general operation in said village within two years from the first day of December, 1887.

Second. The said company shall not charge or collect from said village at any time a greater sum than forty dollars per annum for each hydrant furnished for the use of said village, and at that rate shall furnish all hydrants required by said village at such places as shall be designated by its trustees.

Third. Such company shall be liable over to such village for all damages recovered against said village occasioned by any of the works or operation of said company.

129 Fourth. The streets in which said company shall lay their pipes shall be restored by said company to as good a condition as they shall be in immediately prior to the use thereof, immediately after such use.

Fifth. The rights hereby conferred shall not be sold or transferred by the said applicants to non-residents of the village of Skaneateles. And this instrument further certifies that said resolution so offered having been duly seconded was put to vote and was thereupon duly adopted by the following vote:

Ayes—Thomas Kelley, Joseph Allen, Martin C. Dewitt, Dennis Bockes.

The said resolution was thereupon declared adopted.

In witness of all of which we have hereunto set our hands this 5th day of July, 1887.

MARTIN C. DEWITT,
T. KELLEY,
JOSEPH ALLEN,
Trustees of the Village of Skaneateles.
DENNIS BOCKES,
Supervisor of the Town of Skaneateles.

Adjourned *sine die*.

S. E. BENEDICT, *Clerk*."

130 EXHIBIT 2.

Plaintiff's certificate of incorporation; is as follows:

"STATE OF NEW YORK, } ss:
County of Onondaga, }

We, the undersigned,
John K. Knox of Skaneateles, New York,
Lewis B. Fitch of Skaneateles, New York,
George W. Wickes of Skaneateles, New York,
Edwin E. Hall of Skaneateles, New York,
John McNamara of Skaneateles, New York,
Benjamin F. Petheram of Skaneateles, New York,
John E. Waller of Skaneateles, New York,
George Barrow of Skaneateles, New York,
do hereby certify, that an application, dated the 5 day of July, 1887, was made to the authorities of the village of Skaneateles for permission to organize a water works company to supply said village with pure and wholesome water, and at a meeting of said authorities, held on the 5th day of July, 1887, said application was duly considered and determined by granting the request therein contained.

That we propose to form a company pursuant to the provisions of — the legislature of the State of New York, entitled 'An act in relation to the creation and formation of water works companies in towns and villages of the State of New York,' passed June 12, 1873, and acts amendatory thereof, and supplemental thereto and do hereby set forth:

131 First. The name of the corporation is to be the Skaneateles Water Works Company.

Second. The names of the members of said corporation and their residences are as follows:
John K. Knox of Skaneateles,
Lewis B. Fitch of Skaneateles,
George H. Wicks of Skaneateles,
Edwin E. Hall of Skaneateles,
John McNamara of Skaneateles,
Benjamin F. Petheram of Skaneateles,
John E. Waller of Skaneateles,
George Barrow of Skaneateles.

Third. The capital stock of said corporation is to be forty thousand dollars.

Fourth. The location of the office of said corporation is to be in the village of Skaneateles, county of Onondaga, State of New York

In witness whereof, we have hereunto affixed our hands in the village of Skaneateles on the 12th day of July, A. D. 1887.

JOHN McNAMARA.
L. B. FITCH.
BENJAMIN F. PETHERAM.
JOHN K. KNOX.
EDWIN E. HALL.
JOHN E. WALLER.
GEO. H. WICKS.
GEORGE BARROW."

132 STATE OF NEW YORK, }
County of Onondaga, } *ss:*

John K. Knox, Lewis B. Fitch, George H. Wicks, Edwin E. Hall, John McNamara, Benjamin F. Petheram, John E. Waller and George Barrow, who being duly and severally sworn, say they are the individuals who subscribed the foregoing certificate, and that said certificate and statements therein contained are true to the best of their knowledge and belief.

L. B. FITCH.
EDWIN E. HALL.
JOHN E. WALLER.
GEO. H. WICKS.
JOHN McNAMARA.
BENJAMIN F. PETHERAM.
JOHN K. KNOX.
GEORGE BARROW.

Severally subscribed and sworn to before me this 12th day of July, 1887.

C. R. MILFORD,
Notary Public.

STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

I have compared the preceding with the original certificate of incorporation of Skaneateles Water Works Company with acknowledgment thereto annexed, filed and recorded in this office on
133 the 1st day of August, 1887, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.

[L. S.] Witness my hand and the seal of office of the secretary of state at the city of Albany, this 24th day of June, one thousand eight hundred and ninety.

FRANK RICE,
Secretary of State.

(Endorsed:) Tax for privilege of organization of this corporation, $50.00. Under chapter 143, Laws of 1886, paid to State treasurer before filing. State of New York. Office of secretary of state, *ss.* Filed and recorded Aug. 1, 1887. Diedrich Willers, deputy secretary of state.

Exhibit 3.

The contract of the plaintiff with the village, which is as follows:

The corporation of the trustees of the village of Skaneateles hereby contracts and agrees with the Skaneateles Water Works Company as follows:

The said trustees of the village of Skaneateles, rents and takes of the Skaneateles Water Works Company 40 hydrants, the location of each hydrant to be designated by the said trustees on the mains according to specifications hereinafter referred to for the term 134 of five years. The said company lets and rents to the said village of Skaneateles the aforesaid hydrants, each of which is to be and remain during the continuance of this contract in the places designated by said trustees, and be such as are known as the Ludlow, or other equally as good, non-freezing hydrants with double nozzle, and being the proper size, fitted with the proper thread, so that the first hose now in use in said village can be used on said hydrant- without any change being made in said hose, or coupling of said hose; the said hydrant- to be used for the practice of the fire department, for the extinguishment of fires, for flushing sewers and gutters, and for filling the street sprinkler used by said village for sprinkling the streets of said village for and during the aforesaid period; the said company agreeing to keep and maintain the said hydrants at the aforesaid location at all times supplied with water at a pressure at least to supply all the houses on the mains in said village, and in all parts of said houses, and at any time when so ordered by the chief of the fire department for the purpose of extinguishment of fires or one-half hour each month for the practice of the fire department, or on the occasion of any fire alarm the company agrees to pump water direct into the mains under a pressure of at least sufficient to throw a stream at least 40 feet in heigth through one thousand feet of hose at any hydrant on the said mains. The said company shall, and does hereby grant to the chief of the fire department 135 of said village, or an officer of said department duly authorized by said department, or the trustees of said village, the right and privilege at any time to inspect any or all of said hydrants for the purpose of knowing whether or not they are in good working order; if upon such inspection any of said hydrants are found to be out of working order, upon written notice to that effect specifying the hydrant or hydrants so out of working order, served upon said company, the said company agrees to at once put said hydrant or hydrants in good working order; and it is hereby stipulated that the above privilege granted for inspection of said hydrants does not in any manner absolve or release the said company from the obligation to at all times keep the said hydrants, each and every one of them, in good working order. In case of fire, said village by its trustees and chief engineer, shall have exclusive control of said hydrants without let or hinderance from said company; and the said trustees agree to use said hydrants with usual and ordinary

care, and to pay to said water company for any injury that happens
to them through their carelessness and neglect when used by any
officer, servant or member of the fire department of said village, or
by any employee of said village. In flushing gutters and sewers
the water shall be used through a hose and fire nozzle; no one hydrant
to be used for that purpose exceeding 20 minutes in one week,
or more than one used at a time, nor shall any flushing be
136 done during the existence of a fire in said village. The said
company agrees to establish and maintain a connection between
its pumping station and any engine-house, or other place
in said village designated by the trustees, by electric fire alarm.
The said company agrees to put the streets of said village where
they have—disturbed by digging, or otherwise for the purpose of said
company, within two weeks in as good order and condition as they
were immediately before said disturbance, and should any of the
streets thereafter be disturbed by said company, or its employees,
agents or servants, the said company agrees when ordered by the
board of trustees to put such street or streets in as good order and
condition as they were at the time they were disturbed. For a
compliance *of* the terms of this contract on the part of the said company
the said trustees agree to pay for the rent of each of said hydrants
the sum of $30 annually; one-half of the said sum to be paid
at the end of each and every six months during the continuance of
this contract, but provided, however, that the first payment shall
not be due before July first, 1890. In case any of such hydrants
are discovered by any officer of the village, duly authorized, or
whose duty it shall be to inspect the said hydrants, to be out of repair
and notice given to said company hereinbefore provided, no
payment shall be made, or required for such hydrant, or hydrants
while so out of repair after five days from such notification;
137 and the trustees may deduct from any sum due by them to
said company the sum of $2 for each and every day thereafter
that each hydrant remains out of repair, but not in all exceeding
the sum of $75. In case of an alarm of fire it shall be discovered
that any hydrant necessarily to be used for the extinguishment
of such fire is out of working order, or does not afford a
pressure as hereinbefore provided, the said trustees may deduct the
sum of $50 from the rental of said hydrant, and in addition the
rental of that particular hydrant shall cease while the same is out
of working order, except that the said company shall not be liable
for the negligence or default of the officer, servants or employees of
said village. It is further agreed that in case the trustees shall deem
other hydrants on other places where an extension of the mains
of the said company would be necessary after the completion of the
said works the said company agrees to put or place such hydrants
and construct such main or mains as designated by said trustees,
upon condition that one additional hydrant shall be put on every
500 feet of said extended mains; and that the trustees take and rent
the same and pay therefor at the rate of $40 per year for each and
every hydrant so placed after the same is in working order, and
during the continuance of this contract; one-half the sum to be paid

semi-annually as the other payments are to be made; the
138 pressure of water for the new, or additional hydrants to be
the same as heretofore; and all the agreements heretofore contained relate to the said additional hydrants in the same manner as to the hydrants originally put in. The said company in constructing its works will save said village harmless from all damages, accidents and injuries resulting from, or occasioned by said company, or by the bursting of pipes and mains of said company after the construction of its works. This contract shall take effect and be binding on the respective parties thereto from, and on the day when the works of said company shall have been completed, according to the provisions of this contract, and the said trustees have been notified of their completion; and said company have demonstrated by a practical test that said works are completed according to the terms of this contract, and not before. It is further provided, that, the water furnished by the said company shall at all times be in a pure and wholesome condition; and the said company agrees to construct its main as designated and put forth in the map this day filed with the clerk of said village; and in addition thereto to extend its mains on East Lake street to within 600 feet of William J. Bright's dwelling-house; and on Jordan street to Forest G. Week's dwelling; and on West Lake street to a point opposite William R. Wille's dwelling. If said company shall fail to perform any of the agreements
herein contained on its part to be performed, and such failure
139 shall be caused by neglect or omission on the part of said
water company, the trustees of said village may therefore at their discretion elect, and to terminate and end this contract, such election to be evinced by a notice in writing served on said water company, stating the fault complained of, within at least five days after such failure on the said company's part, and the discovery thereof by the said trustees.

In witness whereof, the said corporation of the village of Skaneateles has caused this contract to be signed by its president, and caused to be affixed thereto the corporate seal of the said village; and in witness of the same the said water works company has caused this contract to be signed by its president, and has caused its corporate seal to be affixed thereto.

Done at the village of Skaneateles, this — day of April, A. D., 1889."

The foregoing contract was duly executed by the village of Skaneateles under the hand of its president and its corporate seal; and by the Skaneateles Water Works Company under the hand of its president and corporate seal, and duly acknowledged.

Ex. 3½. Not printed. It was a corporate mortgage, dated August 22, 1890, given by the Skaneateles Water Works Company to trust company covering the real and personal property and franchises of
the Skaneateles Water Co., to secure the payment of $40,000
140 in bonds of the company and was recorded Sept. 9, 1890, in
Onondaga county clerk's office in Book of Mortgages 259 at page 183, and was in the ordinary form of a corporate mortgage.

Ex. 4. Not printed. It was a corporate mortgage made Feb. 1, 1895, by the Skaneateles Water Works Company to the Delaware County Trust, Safe Deposit & Title Insurance Company of Chester, Pa., as trustees to secure $10,000 of bonds covering the real and personal property and franchise of the Skaneateles Water Co, and was recorded in the clerk's office of Onondaga county in Book 287 of Mortgages, page 455, Feb. 5, 1895, and was in the ordinary form of a corporation mortgage for such purpose.

Ex. 5. Election notice. Appears in the minutes of testimony. It is not here printed.

Exs. 7, 8, 9. Are commissioners' oaths, all in the same form, one of which appears in the forego- case.

Ex. 10. Contract with the village for construction of village water works. Not printed. Its contents being sufficiently described in the testimony in the foregoing case.

141 Exs. 11 to 20. Both inclusive consist of letters and are not printed here because the same appear in full in the foregoing case.

Ex. 21. Plaintiff's offer to the village May 9, 1896. Not printed here because the same appears in the foregoing case.

Ex. 33. Not printed. It was the plaintiff's bond given pursuant to the statute upon bringing action No. 1 as a tax-payer.

Exhibit 34.

Extension of plaintiff's franchise. Not printed in full because the same appears hereinbefore in the printed case, except that the same has added thereto the consent of the supervisor of the town of Skaneateles in the following language:

"I, Stephen Thornton, as supervisor of the town of Skaneateles, approve the foregoing resolution; and consent to the waiver of the provision in the franchise in said resolution referred to, requiring the company referred to, to have its works in general operation by Dec. 1, 1889.

Dated Dec. 14, 1889.

STEPHEN THORNTON, *Supervisor.*"

142 Ex. 36. Form of ballots—"For the water tax." "Against the water tax."

Ex. 37.

Remonstrance against contract with plaintiff as follows:

To the trustees of the village of Skaneateles:

We, the undersigned, citizens and tax-payers of the village of Skaneateles, hereby protest against the contract heretofore entered into by the trustees of this village with the Skaneateles Water Company without the knowledge or consent of the tax-payers, by which it was agreed to pay $1,200 or $1,500 annually for the use of water for fire purposes.

And believing such contract was unauthorized, and that the public interests do not demand so great an outlay, that the question should have at least been submitted to the votes of the people, we hereby ask your honorable board to disaffirm and rescind such contract, and refuse to act under it unless legally compelled to do so.

EDMUND N. LESLIE,
J. C. STEPHENSON,
F. J. HARRIS,
A. P. INGERSON,
WILLIAM J. BRIGHT,
RICHARD SCOURSE,
J. H. DUCKETT,
JOSIAS GARLOCK,

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J. H. GREGORY,
GEO. H. WICKS,
JERRY SHALLISH,
J. B. MARSHALL,
GEO. P. LAWRENCE,
JOSEPH PARISH,
N. TURNER,
LYMAN HALL,
H. N. BERRY,
G. D. HALL,
C. ECKETT,
JAMES A. ROOT,
W. B. LAWTON,
E. R. GREGORY,
E. B. KNAPP,
JOEL BURRIDGE,
F. G. WEEKS,
LEVI WEEKS,
E. B. HOYT,
B. B. NORTHROP,
F. E. AUSTIN,
W. F. GREGORY,
R. M. STACEY,
C. J. SLATTERY,
E. C. PURCELL,
H. A. LIVINGSTON,
C. J. DE LAND,
B. PETHERAM,
JOHN HUMPHREYS,
S. D. CONOVER,
HENRY ELSON,
F. NYE HARWOOD,
GEO. POPLE,
SERENO FIELD,
LUCIAN MOSES,
GEORGE HUNT,
J. C. SIMMONS,
L. B. GOODWIN,
CHARLES READ,
JAMES W. JEWELL,
GEO. B. HALL,
SAMUEL JEWELL,
DANIEL PLATT,
H. G. DAVALL,
JOHN EVANS,
WM. J. WILLIAMS,
FRANK ADAMS,
H. M. SWEET,
HENRY THURLOW,
FRANK T. SIMMONS,
JOHN QUINN,
EDWARD DENT,
JOHN SIMMONS,
GEORGE COX,
WILLIAM SIMMONS,
THOMAS HOLLIER,
CHARLES AVERY,
JAMES CROSS,
FRED HARSE,
LEVI BARTLETT,

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JACOB HOAGLAND,
JOHN ENNIS,
JOSEPH ALLEN,
A. S. TALLEY,
M. C. DEWITT,
JOHN STEPHENSON,
J. H. BURNETT,
WM. MARSHALL,
A. BRADT,
F. H. LESTER,
F. E. TURNEM,
C. M. SMITH,
GEORGE MILFORD,
HENRY HARSE,
N. J. HOAG,
JOHN DAVEY,

ELIAS THORNE,
JAMES HYDON,
DAVID KEELER,
S. H. POTTER,
ORSON YOUNG,
CHAUNCEY B. THORNE,
MATTHEW STEPHENSON,
ALONZO GILLETT,
JOHN ROSSETER,
DANIEL DOHERTY,
GEORGE STEARNS,
GEORGE W. HOPKINS,
WARREN WALLACE,
S. S. KNEELAND,
WILLIAM CORNISH,
D. EARLL,
WM. R. TABER,
JAMES NOLAN,
R. B. THORNE,
JAMES FITZGERALD,
THOS. S. DAY,
FRANKLIN BARBER,
JOHN M. SANDFORD,
KEELING NEWTON,
MICHAEL BRADLEY,
W. S. HOAG,
O. C. GILLETTE,
JOSEPH AVERY,
BENJ. FORSHEE,
T. Y. AVERY.

Ex. 37. (2.) The consent of the superintendent of public works granted to the plaintiff. Not printed here because same appears in full in the foregoing case.

145 Ex. 38. Comptroller's certificate. Not printed here for the same appears in full in the foregoing case.

Ex. 39. Amended contract for construction of village water works. Not printed because sufficiently described in testimony.

Ex. 40. Map of the village of Skaneateles, produced by witness Henry T. Beach, showing streets of the village, location of hydrants, of the plaintiff's pump-house, standpipe, outlet of the lake, well constructed by the village. Not reproduced here because sufficiently described in the testimony.

EXHIBIT 41½.

APRIL 20, '97.

At a meeting of the water commissioners of the village of Skaneateles, held April 20, 1897.

Present: Commissioners Hall, Root, Shultz and Eckett.

On motion of J. L. Shultz, seconded by E. Eckett,

Resolved, That we recommend to the trustees of this village that they call a special election for permission to bond the village of Skaneateles, N. Y., for the sum of $30,000.00 and to sell such part thereof as may be necessary to procure and maintain a pure
146 and wholesome water supply for said village.

Carried.

Ex. 42. Deed of J. L. Clift to the village of Skaneateles, May 2, 1887, recorded May 10, 1887 of which the following is a brief description.

EXHIBIT 42.

All that tract or parcel of land situate in the village of Skaneateles, county of Onondaga, State of New York, being lot one of block 25, as designated on Griffin's map of Skaneateles village and also a part of lot No. 36, in the original township of Marcellus and bounded and described as follows; on the north by Genesee street in said village; formerly the Seneca turnpike road; on the west by lands owned by E. A. Andrews; on the south by Skaneateles lake; on the east by the west line of lands conveyed to R. M. Stacey, by deed, dated Nov. 5, 1880.

Ex. 43 is certificate of the result- of the election as they appear in the testimony in the foregoing case, as follows:

EXHIBIT 43.

Whole number of votes cast was	146
For the water taxes	118
Against the water taxes	27
Defective ballots	1
Ballots returned not voted	1

147 STATE OF NEW YORK, } *ss:*
Onondaga County, }

John Connell, Edwin Whiting, Edward Dent, Warren B. De Witt, being duly and severally sworn say, each for himself the said Edward Dent that he was chairman, that said John Connell, Edwin Whiting and Warren B. De Witt, that they were inspectors of an election held in and for the village of Skaneateles on the 9th day of May, 1896, and that the foregoing statement of the result of said election is true to the best of his knowledge and belief.

WARREN B. DE WITT.
JOHN CONNELL.
EDWIN WHITING.
EDWARD DENT.

Sworn to before me, this 9th day of May, 1896.

M. F. DILLON,
Justice of the Peace.

148 EXHIBIT 45.

Supreme Court.

Trial Desired in Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village and Individually; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village and Individually, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, Individually and as Water Commissioners of the Village of Skaneateles, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated Sept. 8th, 1896.

GEORGE BARROW,
Plaintiff's Attorney.

Office address, Skaneateles, N. Y.
Post-office address, Skaneateles, New York.

149 Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village and Individually; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village and Individually, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, Individually and as Water Commissioners of the Village of Skaneateles, Defendants.

The plaintiff above named for an amended complaint herein, states and alleges:

I. That at all the times and dates hereinafter mentioned it was and still is a domestic corporation, organized and existing under chapter 737 of the Laws of 1873 and the acts amending the same, and during such time it has been and now is engaged in furnishing to the inhabitants of the said village of Skaneateles pure and wholesome water.

II. The plaintiff further states and alleges, that it is and has been for several years last past, assessed as a tax-payer in said village, that the sum of its assessment or assessments in said village amounts to the sum of one thousand dollars; that it is liable to pay
150 taxes on such assessment or assessments in said village and
that it has been assessed and has paid taxes in said village upon an assessment of one thousand dollars, within one year previous to the commencement of this action.

III. That the defendant, The Village of Skaneateles, aforesaid, is a municipal corporation of this State; that the defendant, E. Norman Leslie, is the president of said village; and that John Connell, Edwin Whiting and Edward Dent are the trustees of said village.

IV. That heretofore the said village of Skaneateles, and the authorities duly empowered, granted a franchise to construct and maintain within said village, a system of water works for furnishing to the said village and its inhabitants pure and wholesome water; that the said corporation plaintiff now is the owner of the said franchise and is possessed of all the rights, legal and equitable appertaining thereto; that the said corporation in or about the year 1889, constructed or caused to be constructed under and in pursuance of said franchise a complete system of water works for supplying the said village and its inhabitants with pure and wholesome

water; that it has fully and in all respects complied with the terms and conditions upon which the said franchise was granted, that at the time of the granting of said franchise and the construction of said system of water works, the said village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any
151 system of its own, but was in great and urgent need thereof, but
that it and its inhabitants were averse to the establishment or erection of any system of its own, for furnishing to itself or its inhabitants a system of water works; that the system of water works so constructed and completed as aforesaid by this plaintiff, was, and at all times since has been and now is, a complete and adequate system:—that its pipes are laid in all the streets of said village; that no complaint exists or ever has existed, and no complaint has ever been made, that the water furnished by said plaintiff has not been pure and wholesome; or that the sufficiency thereof has not been abundant; or that the head or pressure thereof has not been adequate or sufficient for fire protection, and for all other purposes; that the source from which said corporation plaintiff procures its water is Skaneateles lake, which is the only source from which water can be obtained for supplying the said village with pure and wholesome water; that upon the completion of said system of water works, as aforesaid, the said plaintiff contracted with the said village for the term of five years to supply the water for forty hydrants and for other purposes for the sum of thirty dollars ($30) each; that the said contract expired on the first day of February last past, but was not renewed; that after the expiration of said contract the said company offered to furnish water to said village for its fire protection at the rate of $40 per hydrant
152 for the term of five years and after the expiration of said five
years for five, ten, fifteen, twenty or thirty years at the rate of $30 per hydrant; that up to that time, the expiration of said contract, the income derived from the said village and from the inhabitants for rentals had been wholly inadequate to pay the fixed charges and running expenses of the corporation, to cover which the said corporation asked an increase of hydrant rentals from said village at $10 each for the next five years; that the said sum asked for hydrant rentals was exceedingly low, and taking into account the number of hydrants and the elevation to which water was required to be pumped, was less than the sum charged, as plaintiff is informed and believes, by any corporation furnishing water to any village or municipal corporation in this State; that the rates charged by said corporation to private consumers were and now are equally low; that the said village by its authorities ignored or refused to accept the offer made by the plaintiff aforesaid; that the said company also offered formally, before any of the proceedings of the defendants hereinafter were taken, to consent that appraisers might be appointed in condemnation proceedings under the statute, to determine the value of its plant, and that it would co-operate with said village for the acquisition of its plant upon such proceedings, that such offer was ignored or refused.

V. The plaintiff further alleges that the annual elections
153 in said village occur on the third Tuesday in March; that at
the last election in said village held on the 17th day of March, 1896, said defendant E. Norman Leslie was elected president and said defendant Edward Dent was elected trustee, said defendants Edwin Whiting and John Connell as trustees of said village holding over; that the next annual election to be held in said village will be held on the third Tuesday in March, 1897; that after the election and qualification of said E. Norman Leslie and said Edward Dent, the said E. Norman Leslie as such president called a special meeting of the board of trustees of said village to be held on the 21st day of March, 1896, for the purpose of appointing water commissioners for said village; that prior thereto no water commissioners have ever been appointed for said village and the authorities of said village and never organized as a board of water commissioners; that at the said meeting aforesaid the trustees of the said village instead of causing the president of said village to appoint commissioners, three or more in number, as they were authorized to do, adopted a resolution of which the following is a copy.

"Resolved, That the president be and is hereby authorized to appoint the following-named persons as water commissioners of the village of Skaneateles, N. Y., Lemuel D. Hall, James A. Root, Edward Eckett, and John L. Shultz;" that thereupon a discussion took place in the said meeting, the president claiming that he had
the right to appoint commissioners not named by the trus-
154 tees, and the trustees or some of them, claiming that the trus-
tees had the right to name the commissioners who should be appointed; that the president yielded and thereupon named Lemuel D. Hall, James A. Root, Edward Eckett and John L. Shultz, to be water commissioners for said village and they were thereupon confirmed by the said trustees as such; and plaintiff further alleges upon information and belief, that the said persons so appointed or named, thereafter took the usual oath; that thereafter the said persons so appointed as aforesaid, met and organized, or assumed to organize as a board of water commissioners, for said village but that they did not at that time (nor have they at any time since) determined their terms of service as required by law; that notwithstanding the same, they have assumed to act and now assume to act as water commissioners for said village.

That on the 23rd day of April, 1896, said persons so acting or assuming to act as a board of water commissioners for said village, presented to the trustees of the village of Skaneateles a communication in writing of which the following is a copy:

"To the trustees of the village of Skaneateles.

GENTLEMEN: We, the board of water commissioners of Skaneateles village, having organized by the election of a president, secretary and treasurer, would respectfully request your honorable

body to issue a call for a special election to determine the
155 question of bonding the said village to furnish a supply of pure and wholesome water for said village, pursuant to chapter 181 of the Laws of 1875.

Yours respectfully, LEMUEL D. HALL, *President.*
JOHN L. SHULTZ, *Secretary.*"

That thereupon and at the same meeting of the trustees the following resolution was adopted, namely,

"Resolved, That the clerk, in conformity to the request of the board of water commissioners, be directed to issue a call for a special election to be held in the trustees' room in the engine-house in the village of Skaneateles, N. Y., on the 9th day of May, 1896, from 1 o'clock until sundown of that day, to determine the question whether the village of Skaneateles shall bond itself for the purpose of supplying said village with a supply of pure and wholesome water to the amount of $30,000, as provided by chapter 181 of the Laws of 1875;" that at the same meeting it was further resolved as follows, namely, "Resolved, That the clerk be authorized to have the following notice published in the Skaneateles Free Press for two weeks:

Special-election Notice.

We, the undersigned, board of trustees of the village of
156 Skaneateles, county of Onondaga, New York, hereby give notice that a special election will be held in the trustees' room, in the engine-house in the village of Skaneateles, N. Y., on Saturday, May 9th, 1896, at which the question will be submitted whether the taxes, under the act, chapter 181, Laws of 1875, authorized for the purpose of furnishing pure and wholesome water to the inhabitants of said village, shall be levied and collected from the village as in that act provided and whether the village of Skaneateles shall bond itself for the above-mentioned purpose to the amount of $30,000. The vote shall be by ballot. Those in favor of taxes shall have printed thereon 'For the water taxes' and on the ballots of those opposed 'Against the water taxes.'

The polls of the election will open at 1 o'clock in the afternoon and continue open until sunset of the 9th of May, 1896.

E. NORMAN LESLIE, *President.*
JOHN CONNELL,
EDWIN WHITING,
EDWARD DENT, *Trustees.*

Skaneateles, April 23, 1896."

That thereafter the said notice in the said form was published in the said Skaneateles Free Press for two weeks, excepting that the same as published was headed "Special election" instead of "Special-election notice;" that thereafter and on the 9th day of May, 1896, no other notice having been published and no other notice
157 having been applied for by the said persons acting as a board of water commissioners, the trustees of said village met at the

place and time designated, and proceeded to receive votes offered; that votes were received having printed thereon "For the water taxes" and "Against the water taxes"; that before the voting and before any votes were received, the trustees aforesaid announced that they would receive all votes offered by those whose names appeared upon the last assessment-roll of the village and such votes only; that they would not receive the votes of those who were only voters or electors in said village; that votes were offered by legal voters or electors in said village whose names were not upon the last assessment-roll of said village, but that the same were rejected; that votes were received from non-residents of said village and non-voters or electors therein, whose names appeared on the last assessment-roll of said village; that a majority of the votes so cast, received and counted were cast for the ticket having printed thereon the words "For the water taxes," but that the number of votes polled was greatly less than the number of residents of said village whose names appeared on the last assessment-roll of said village; that thereafter it was announced by the said trustees acting as inspectors, that the ticket having endorsed or printed thereon the words "For the water taxes," had received a majority of the votes cast.

VI. And the plaintiff further says, upon information and
158 belief, that the said defendants, Lemuel D. Hall, Edward
Eckett, John L. Shultz and James A. Root, as water commissioners of said village, intend, in pursuance of the said vote, to proceed with the duties imposed by law upon water commissioners and water boards in villages; that it is their purpose and intention to forthwith issue bonds upon the credit of said village, and procure the same to be sold and to use the proceeds thereof in the construction of a plant to be owned and operated by the said village in opposition to the plant now existing; that the water designed to be used is to be derived from the same source, to wit: Skaneateles lake; and their plan of construction proposed is to be similar to the plan of construction of the present plant, to give the same pressure of water for fire protection; that they have employed an attorney to act for them; that they have employed surveyors and engineers on the credit or at the expense of said village to make plans and specifications for a system of water works for said village; that they have incurred traveling and other expenses of themselves upon the like credit or expense; that they have caused bonds to be printed and have offered the same for sale, and have received bids therefor; that they have also advertised for bids for building a system of water works, and have received bids, and have, as plaintiff is informed and believes, accepted a bid for the construction of a proposed system of water works to be constructed and operated in opposition to the plant of this plaintiff.

159 VII. The plaintiff further alleges, that the said defendants, Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, acting or assuming to act as such water commissioners, have not, nor has either of them, executed or filed with the clerk of the county of Onondaga their joint and several bonds, or their separate bonds or any bond or bonds, with sureties, executed in the manner

and in pursuance of the requirements of the statute requiring such bond or bonds to be so filed before any bonds, certificates or other obligations of indebtedness shall be issued, or any official act be done by any board of commissioners authorized by the statute under which said pretended commissioners assume and pretend to be acting.

VIII. And this plaintiff, upon its information and belief, alleges, that the alleged pretended appointment of the said Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners for the village of Skaneateles aforesaid, was illegal and void; and not made by the president of said village, in pursuance of the statute in that case made and provided, and that their appointment was invalid and that by reason thereof they acquired no power or authority to act as such commissioners, and that all the acts performed by them by virtue of such appointment are illegal and void; that the said pretended commissioners have failed to comply with the statute in that case made and provided, in
160 that they have never met and determined their respective
terms of service, as required by law, and that they have no power or authority to act as such commissioners until they have so met and determined their respective terms of service; and that all their acts done are illegal and void; that the said pretended commissioners are not authorized to act, in any event, as such water commissioners, excepting to determine their term of service, until the next annual election to be held in said village, and that all their acts done are illegal and without authority *by* law; that said pretended commissioners have never been legally authorized to act by any vote of the persons entitled to vote, and of whom the statute requires a majority, before commissioners are authorized to proceed under authority of law; that the notice given by the trustees of said village, defendants herein, of a "special election" was not such a notice as they were required or authorized to give, to confer upon commissioners the powers mentioned in the statute; that the same was not a notice of a meeting contemplated by the statute, it was not a notice to the persons entitled to vote upon the question submitted; it was not a notice of a meeting to vote upon any question which the trustees were authorized to submit; that it was on the contrary notice of a special election to vote upon aproposition which the trustees had no authority to submit to a vote of the people, that the same was illegal and contrary to the statute, and the vote
161 thereon did not confer upon water commissioners any right,
authority or power to proceed to act as water commissioners.

That the trustees of the said village, defendants herein, erred in receiving the votes of tax-payers who were not residents or voters in said village; that they erred in rejecting and refusing to receive the votes of those who were qualified to vote in said village, and that the vote received, counted and proclaimed, conferred no power under the statute upon the said water commissioners, and that all their said acts done have been done in violation of law and contrary to the statute, and their acts aforesaid threatened to be done, if done will be illegal and void; that by reason of the failure of said pretended commissioners to file the bond or bonds required by law, all their official acts as commissioners are illegal and void.

IX. The plaintiff farther alleges, that the village of Skaneateles, is a village having a population of about 2,000 persons; that such population is too small and insufficient to support two water systems; that if such new system shall be constructed to be operated in opposition to the present plant, neither of said systems will be profitable, and that the tax-payers of said village, including the plaintiff, will have to be taxed to support and maintain such new proposed system; that in the operation of such new plant, in opposition to the present plant, much confusion will necessarily arise in relation to the laying of pipes for such new system and in the crossing of service pipes over the mains of the present plant out of which
162 litigation is likely to arise lasting for a series of years; that
if the present plant was acquired by said village under condemnation proceedings as it is authorized and empowered to acquire by law, it would acquire a plant for no more than its value, and be enabled to operate it without competition and to its great advantage and profit; that the construction of such new plant by said pretended water commissioners, will result in a great waste of and injury to the estate, funds and other property of said village and be of lasting and irreparable injury to the village of Skaneateles and its inhabitants.

Second.

For a second and further cause of action the plaintiff states and alleges:

I. That heretofore and in or about the year 1887, the village of Skaneateles being a municipal corporation of this State, having a population of about two thousand inhabitants, was possessed of no system of water works for supplying its inhabitants with pure and wholesome water; nor was it provided with any water for fire protection or sewerage or sanitary purposes; that the inhabitants of said village were at that time opposed to incurring the expense of constructing any system of water works; that the authorities of said village, together with the supervisor of the town of Skaneateles, in which town said village is situated, upon application duly made, then duly granted a right, privilege or franchise, to construct a system of water works in said village, for supplying the said village and its
163 inhabitants with pure and wholesome water, and to occupy
the streets of said village perpetually for such purpose; that upon the grant of such franchise conditions were imposed; that the plaintiff herein became the owner of said franchise, grant or privilege, and proceeded to, and did, construct a valuable and desirable system of water works for furnishing to said village and its inhabitants pure and wholesome water, and took possession of the streets of said village, and has ever since occupied, and now occupies the same with its pipes, mains, hydrants, valves, etc., as required in order to perform the conditions imposed by said grant; that the said corporation plaintiff expended large sums of money in the construction of its said plant, and obtained money therefor by mort-

gaging its said franchise and property in the village of Skaneateles, as security for its bonds duly issued and now outstanding, amounting to $50,000, none of which have been paid; that the said bonds are now held and owned by a large number of persons; that the construction of such works by said village would impair and destroy the value thereof, and such construction, as plaintiff is informed and believes, would render such defendants liable to a multiplicity of actions to be brought by the several holders of said bonds, to restrain such construction, and to prevent such destruction and impairment of the value of such bonds.

II. That the contract of the plaintiff with the defendant, The Village of Skaneateles, for supplying it with pure and wholesome
water as aforesaid, expired on or about the 1st day of Feb-
164 ruary last, and the said defendant, The Village of Skaneateles,
refused to make any contract whatever with said company, but through its authorities, inaugurated a scheme to construct a system of its own for supplying itself and its inhabitants with pure and wholesome water from Skaneateles lake; that in pursuance thereof the defendants, Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, claimed to have been appointed water commissioners by virtue of the proceedings hereinbefore set forth in the foregoing first cause of action, to which reference is hereby made for said proceedings, and the proceedings mentioned in said first cause of action, as therein set forth, were had and taken, all to the end and purpose of constructing a system of water works in said village to be operated in opposition to and in competition with the plant of this plaintiff, and on behalf of said village, and said pretended commissioners are now proceeding as such to construct such plant; that they have issued or are about to issue the bonds of said village for such purpose, and have contracted or are about to contract for the construction of such system of water works.

III. Plaintiff further alleges that the plant or system to be constructed by said village through said pretended commissioners as aforesaid, will in view of the plant of the plaintiff existing in the same street and location, possess but little value, and will constitute a waste of, and injury to, the estate, funds and other property of said
village.

165 Wherefore, the plaintiff prays for a judgment in this ac-
tion, determining the acts of the president and trustees in appointing water commissioners for said village to be void, and determining and declaring all the acts performed by said trustees and by said persons so appointed commissioners aforesaid, to have been illegal and without authority in law and void, and requiring the said persons so appointed as aforesaid, to restore and make good to said village, any property, funds or estate of the said village, and to restrain the trustees of said village permanently and perpetually from auditing or paying any indebtedness incurred by said persons assuming to act as such commissioners heretofore contracted or agreed to be paid by them; and also for judgment restraining the defendants, Lemuel D. Hall, James A. Root, Edward Eckett and John L. Shultz, and each and every of them, and their attorneys,

agents, and servants, from doing or suffering to be done, any act whatsoever authorized to be done by water commissioners legally appointed and legally acting and authorized to act, under the statutes of this State, or appointed by water commissioners to be done, whether jointly, severally or distributively, for the promotion, furtherance or consummation of the scheme or plans contemplated by any act or statute or of any scheme or plan of said persons claiming to act or acting as water commissioners for said village; and that the defendants and each and every of them, according to the
166 function claimed by them, respectively whether jointly, severally or distributively, be restrained and enjoined perpetually from exercising such powers and functions in the premises; the plaintiff also prays for an injunction during the pendency of this action, restraining the defendants in the manner above set forth until final judgment in the action shall be rendered, and for the costs and disbursements of this action.

GEORGE BARROW,
Plaintiff's Attorney, Skaneateles, N. Y.

STATE OF NEW YORK, }
Onondaga County, } *ss:*

George Barrow, being duly sworn, deposes and says: That he is a director of the corporation plaintiff in the above-entitled action; that he is also an officer of the said plaintiff other than that of director, to wit: the manager thereof, and that he is the attorney for the plaintiff herein; that none of the other officers of said company, excepting directors, reside in the State of New York, and that the foregoing complaint is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the plaintiff is that said plaintiff is a domestic corporation and cannot make the same; that the grounds of deponent's belief as to all matters in said complaint contained not stated upon his knowledge, are an
167 inspection of the records of the village of Skaneateles, his familiarity with the plaintiff from its organization, and a long residence in said village, and a general knowledge of the transactions alleged in said complaint.

GEORGE BARROW.

Sworn to before me, this 31st day of October, 1896.

G. O. DURSTON,
Notary Public.

Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village and Individually; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village and Individually, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, Individually and as Water Commissioners of the Village of Skaneateles, Defendants.

SEPTEMBER 9TH, 1896.

168 On the sworn complaint in the above-entitled action and on the affidavit of George Barrow therein, a motion being made by George Barrow of counsel for the plaintiff for a preliminary injunction against the defendants or some of them and sufficient reason appearing why the same should be granted:

It is hereby ordered: That, until the further order of the court, the above-named defendants, Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, both as individuals and as water commissioners of the village of Skaneateles, separately and collectively, and their and each of their agents, servants and employees, be commanded, and they are hereby commanded to refrain from doing or suffering to be done any act whatsoever authorized to be done by water commissioners legally appointed and legally acting and authorized to act under the statutes of this State; or appointed by water commissioners to be done, whether jointly, severally or distributively for the promotion, furtherance or consummation of any scheme or plan of said persons claiming to act or acting as water commissioners of the village of Skaneateles, upon the ground that such acts, if performed, would be illegal.

And on the complaint and affidavit aforesaid, let the defendants herein, or their attorneys, show cause before this court, on the 19th day of September, 1896, at 10 o'clock in the forenoon of that day at the court-house in the city of Syracuse, why the foregoing order, or some order to be made of like import and effect, should not be continued in full force and until the final judgment and decree
169 in this suit; and until the foregoing order is modified let the same be in full force and effect.

P. B. McLENNAN,
Justice of the Supreme Court.

GEORGE BARROW,
Plaintiff's Attorney.
Office & post-office address, Skaneateles, N. Y.

It is hereby stipulated that the foregoing case and exceptions, containing all the evidence given upon the trial of the above action and all the proceedings upon said trial may be settled and ordered filed in Onondaga county clerk's office.

GEORGE BARROW,
Plaintiff's Attorney, Skaneateles, N. Y.
M. F. DILLON,
Defendant's Attorney, Skaneateles, N. Y.

The foregoing case and exceptions, containing all the evidence given upon the trial of the above-entitled action and all the other proceedings upon said trial, are hereby settled and allowed and ordered to be filed in Onondaga county clerk's office.

JOHN W. HOGAN, *Referee.*

170 Supreme Court.

Trial desired in Onondaga county.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of the said Village; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 29, 1896.

GEORGE BARROW,
Plaintiff's Attorney.

Office and post-office address: Skaneateles, N. Y.

171 Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

The plaintiff above named, complains of the defendants, and for cause of action, alleges:

That at all the times hereinafter mentioned, said plaintiff was and still is a domestic corporation, organized and existing under chapter 737 of the Laws of 1873, and the several acts amending the same, and ever since the 1st day of January, 1890, it has been and now is engaged in furnishing to the inhabitants of said village of Skaneateles, pure and wholesome water.

That the defendant, The Village of Skaneateles, is a municipal corporation, organized and existing under chapter 291 of the Laws of 1870 of this State; that the defendant, E. Norman Leslie, is the president of said village, and that the defendants, John Connell, Edwin Whiting and Edward Dent, are the trustees of said village.

172 That the plaintiff was incorporated and organized as aforesaid, for the sole purpose of supplying the village of Skaneateles and its inhabitants with pure and wholesome water.

That on the 5th day of July, 1887, a petition was presented to the trustees of the village of Skaneateles, and to the supervisor of the town of Skaneateles, pursuant to the provisions of the said statutes providing for the incorporation of water companies.

That thereupon the said authorities adopted a resolution as follows: "That the application of John E. Weller, George H. Wicks, Lewis B. Fitch, Edwin E. Hall, John K. Knox, John McNamara, Benjamin F. Petheram and George Barrow, bearing date this 5th day of July, having been duly considered, it is hereby determined that such application be, and the same is hereby granted, subject nevertheless, to the conditions following:

First. The company to be formed under the authority hereby conferred, shall have its works in general operation in said village, within two years from the 1st day of December, 1877.

Second. The said company shall not charge or collect from said village at any time a greater sum than forty dollars per annum for each hydrant furnished for the use of said village, and at that rate shall furnish all hydrants required by said village at such places as shall be designated by its trustees.

173 Third. This company shall be liable over to said village for all damages recovered against said village, occasioned by any of the works or operations of such company.

Fourth. The streets in which said company shall lay its pipes shall be restored by said company to as good a condition as they shall be in immediately before such use.

Fifth. The rights hereby conferred shall not be sold or transferred by said applicants to non-residents of the village of Skaneateles."

The said authorities made and signed a certificate to that effect, and the same, or duplicates thereof, were thereafter filed as required by the said statute. That the said franchise was duly accepted by the persons named in said application and in said franchise, and said persons thereafter duly met and organized as a water works company under the name of "The Skaneateles Water Works Company," and duly filed in the office of the secretary of state a certificate of such organization, in the form and in the manner required by law: and the said corporation so organized is the plaintiff herein. Thereafter the time limit of such franchise, was by the said village extended to December, 1890, and the said plaintiff thereunder and upon the faith thereof constructed a system of water works adequate for and for the purpose of supplying to the said village and its inhabitants, pure and wholesome water, and it has fully and in all respects performed all the conditions of its said franchise.

174 That the works of said company having been fully completed it entered into a contract with the said village, for the

supplying to said village of water by means of its water-works system, for fire protection, sanitary and municipal purposes, for a term of five years from February 1, 1891.

And the plaintiff further alleges, that it fully performed all of the conditions of its said contract, and said contract last hereinbefofre mentioned, expired by its limitation on the 1st day of February, 1896, and by said village was not renewed; that the plaintiff has ever since been ready and willing to fu-nish the use of its hydrants to said village, at the rate mentioned in its said franchise; it has never been asked to so furnish its hydrants or any water to said village for any purpose since the expiration of its said contract; it has never refused to furnish water to said village for fire protection or for any other purpose; its system of water works is a good, adequate and sufficient system for all the wants and requirements of said village. The water it has furnished, and which it has been prepared to furnish, ever since the construction of its works, and is now prepared to furnish, has been and is pure and wholesome water taken from Skaneateles lake; that no complaint has ever been made to the plaintiff in regard to the character of the water furnished, by it, or in regard to its sufficiency for fire protection or municipal or sanitary purposes; that it has regularly furnished water to the inhabitants of said village at un-
175 usually low rates, and its system adequately supplies the
wants of said village, which is a village of about two thousand inhabitants, with facilities for the use and consumption of pure and wholesome water; that the income derived by the plaintiff since the construction of its works, has been wholly insufficient to earn for its stockholders any dividend; that it has been insufficient to pay its fixed charges and operating expenses, and that its stockholders have been obliged to advance money to pay such fixed charges and operating expenses, because the same were greatly in excess of its income.

That when the said franchise was granted by the said village, and the plaintiff was organized, the said village was not supplied with a system of water works, and the inhabitants thereof were dependent upon wells and cisterns and said village was wholly without a system of water works for fire protection, and all other needed municipal purposes; that said village was then in great and urgent need of a sufficient supply of pure and wholesome water for such purposes; that it was then authorized and empowered by law to construct and operate a system of water works of its own for supplying to itself and to its inhabitants pure and wholesome water, and if was likewise authorized at its election to contract with a private company to furnish to it and to its inhabitants pure and wholesome water; that being so authorized by law, it duly and regularly
176 made its election to grant a franchise to a private company,
to wit: to the plaintiff, and did in pursuance of such election grant the franchise aforesaid, under which the said company was organized and under and upon the faith of which said company constructed as aforesaid its system for supplying to said village and its inhabitants the water required by it and them; that the said

system so constructed by said company, was constructed at great cost, and its property, rights and franchises were duly mortgaged to secure its bonds duly issued, to the amount of forty thousand dollars, for the purpose of raising money necessary for the construction and operation of its said system; that such bonds were duly sold and all of the same are now outstanding and unpaid; that they are widely scattered in ownership and are largely held by women and persons of limited means as investment.

That thereafter the said plaintiff, having failed to receive an income from its plant equal to its fixed charges and operating expenses, became indebted unto divers persons and to pay off and extinguish such indebtedness, duly executed a second mortgage upon its property, rights and franchises, to secure its bonds duly issued, to the amount of ten thousand dollars, which bonds were thereafter sold, and all of the same are now outstanding and unpaid; that the present bonded indebtedness of plaintiff is fifty thousand dollars; that its income does not exceed two thousand dollars per
177 annum from private or individual consumers, and with no income derived from said village, the income derived from the operation of its plant is sufficient to pay its fixed charges, not to mention its operating expenses.

Plaintiff further alleges, that the works of the plaintiff were constructed under said franchise, for the purpose of supplying said village with pure and wholesome water, upon the conditions therein mentioned, and subject thereto, as the authorities of said village then knew and understood, for the benefit and advantage of said village and its inhabitants; that notwithstanding the premises aforesaid, and in violation of the rights, contracts and obligations thus created and existing between said plaintiff and the said village of Skaneateles, and without notice to this plaintiff, and without any proceeding to vacate or annul the said franchise of the plaintiff, or to dissolve the existing relations between the plaintiff and said village, the president of said village, did on or about the 21st day of March, 1896, appoint the defendants, Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, to be water commissioners of said village, having in contemplation the purpose of constructing for said village a water-works system of its own; that the said persons so appointed as water commissioners, immediately began to act, and have since continued to act, and are now acting as such.

That in pursuance of the purpose aforesaid, the said contract of said village with the plaintiff having expired on February
178 1st, 1896, the said authorities of said village refused and neglected to enter into any contract with said plaintiff to supply to said village any water for any of the public uses of said village, and the said village since about the 1st day of February, 1896, has had no special contract with the plaintiff for such purposes, nor any contract, except that made by said petition, franchise and the action of said village and the plaintiff thereunder.

That after the appointment of such persons to be water commissioners as aforesaid, said appointment was confirmed by the trustees of said village and immediately thereafter, and ever since, the said

persons so appointed have acted or assumed to act as water commissioners of and for said village; that they caused or assumed to cause a meeting of the electors of said village, to be called by the trustees of said village, in assumed pursuance of the provisions of chapter 181 of the Laws of 1875, and the acts amending the same, at which meeting the trustees of said village presided or presumed to preside under the provisions of said act, and obtained a vote, or assumed to obtain a vote, of persons entitled to vote under the provisions of said act in favor of a ballot having printed thereon "For the water taxes;" that after said vote, said defendants assuming to act as such water commissioners, proceeded with great haste in furtherance of said purpose and design, and have issued or caused to be issued, bonds of said village, and have sold the same, or some portion thereof, or are
attempting to sell the same, and have entered into a contract
179 with some person or persons or corporations, to the plaintiff
unknown, to contract for said village a water-works system to be operated in opposition to the water-works system of the plaintiff, or on behalf of said village; that the said person, persons or corporations are now actually engaged in the construction of said system of water works for said village, in violation of its said franchise, contracts and obligations with this said plaintiff after the election made by the said village, as hereinbefore set forth, all of which has been done without notice to the plaintiff and without any proceeding to vacate or annul the said franchises, or to dissolve the relations existing between said plaintiff and said village, and in violation of the provisions of section 10 of article 1 of the Constitution of the United States, and of section 6 and article 1 of the constitution of the State of New York.

That the construction and operation of said works by the said village, impairs and destroys the value of the plaintiff's said franchise and its contracts with said village, and practically destroys and confiscates its property and renders valueless the bonds of the said plaintiff, and inflicts great wrong and hardship upon the owners thereof; that the acts of said village in constructing said works are as against this plaintiff in violation of law, inequitable and wholly unauthorized.

That the plaintiff has no adequate remedy at law in the premises.

Wherefore, the plaintiff prays judgment in this action,
180 determining and adjudging that the acts of said village of
Skaneateles, its president and trustees, and of said persons acting as water commissioners, as aforesaid, are void, and adjudging and determining that all the acts performed by the said village, president, trustees and persons so appointed water commissioners, in respect of the construction of water works for said village, have been illegal, void and in violation of the plaintiff's rights under its said franchise and contracts with said village.

And also adjudging and decreeing, that the defendants herein, and each of them, and each and every of their servants, attorneys, agents, contractors and employees, be forever restrained and prohibited from further proceeding with the construction of said water-works system, and from doing or suffering to be done any act or thing whatsoever, in furtherance of the construction or operation of any system of water works for said village.

And the plaintiff further prays, that in the meantime and during the pendency of this action, the defendants, and each of them, and their agents, attorneys, servants, employees and contractors be restrained in the manner above set forth, until final judgment herein, and for such other, further or different relief, as may be just and equitable, and for the costs and disbursements of this action.

GEORGE BARROW,
Plaintiff's Attorney.

Office & P. O. address, Skaneateles, New York.

181 ONONDAGA COUNTY, *ss:*

George Barrow, being duly sworn, deposes and says: That he is the attorney for the plaintiff in this action; that he is a director and manager of said plaintiff, which is a domestic corporation; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That this verification is not made by the plaintiff because the plaintiff is a domestic corporation, and cannot make the same; that deponent is an officer thereof, to wit: a director; that the grounds of deponent's belief as to all matters not stated in said complaint, upon his knowledge, are his inspection of the records of the defendant, The Village of Skaneateles, of the contracts and franchises therein mentioned, and information derived from the officers of the plaintiff, and from his personal relations to and with the plaintiff since the organization of said plaintiff.

GEORGE BARROW.

Sworn to before me, this 30th day of October, 1896.

JOHN L. SEAGER,
Notary Public, Onon. Co., N. Y.

182 Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

The above-named defendants, for answer to the complaint of the plaintiff herein:

I.

Admit that the defendant is a corporation, as alleged in the complaint, and that ever since the 1st day of January, 1890, it has been and is now engaged in furnishing to the inhabitants of the village of Skaneateles pure and wholesome water, and it avers that it has not furnished any water to said village since the 1st of February, 1896.

And further answering the defendants admit that the village of Skaneateles is a municipal corporation, and the defendants named in paragraph two of the complaint the president and trustees 183 of said village, and that the plaintiff was incorporated for the sole purpose of supplying the village of Skaneateles and its inhabitants with pure and wholesome water; that on July 5th, 1887, a petition was presented to the trustees of the village of Skaneateles, a copy of which is hereinafter set forth; that the franchise in the resolution mentioned in said complaint was accepted by the persons named in the application therefor, and that said persons or others thereafter organized a water works company, under the name of The Skaneateles Water Works Company, which is the plaintiff herein.

And further answering the said defendants admit and aver that thereafter a resolution was adopted by a part of the trustees of said village, a copy of which is set forth in the complaint. That the following is a copy of said petition:

The undersigned, having organized for the purpose of forming a water works company to supply the village of Skaneateles and its inhabitants with pure and wholesome water, hereby represent and set forth that the persons who propose to form such company are John E. Waller, George H. Wicks, Lewis B. Fitch, Edwin E. Hall, John K. Knox, John McNamara, Benjamin P. Petheram and George Barrow.

That the proposed capital stock of the company is forty thousand dollars, to be divided into four hundred shares of $100 each, and the source from which water is to be supplied is Skaneateles 184 lake in the State of New York, and the authorities of said village are hereby requested to consider this application to supply the said village and the inhabitants thereof with pure and wholesome water.

(Signed)

JOHN E. WALLER.
GEORGE H. WICKS.
LEWIS B. FITCH.
EDWIN W. HALL.
JOHN K. KNOX.
JOHN McNAMARA.
BENJAMIN F. PETHERAM.
GEORGE BARROW.

And the defendants further answering aver upon information and belief that the source of supply proposed by the plaintiff in the said petition was the water of Skaneateles lake, and that it has supplied said village with water from that source; that said plaintiff was incorporated under and by virtue of chapter 737 of the Laws of 1873, and the acts of the legislature supplementary thereto and amendatory thereof; that it was provided by said act that companies incorporated thereunder should have no power to take the water from any of the canals of the State, or from canal reservoirs as feeders, or

any streams which have been taken by the State for supplying the canals with water; that said Skaneateles lake is a canal reservoir taken by the State for the purpose of supplying water to the Erie
canal and that said water has been taken from said lake by
185 said plaintiff without authority on the part of said State, and
in violation of the provisions of the act under which said plaintiff was incorporated, and that said plaintiff is now taking water from said lake in violation of the provisions of said act, and is not legally entitled to take water therefrom.

And the defendants admit that the plaintiff, previous to December, 1890, constructed a system of water works adequate for the purpose of supplying the said village and its inhabitants with pure and wholesome water, but said defendants deny that said plaintiff has fully and in all respects performed the conditions of its said franchise.

And said defendants admit that the plaintiff entered into a contract with the said village, for supplying said village with water for fire protection, sanitary and municipal purposes, for the term of five years from February 1, 1891, at the rate of $30.00 per hydrant per annum, and that said plaintiff performed said contract on its part until the same expired by limitation on the 1st day of February, 1896; and the defendants upon information and belief deny that the plaintiff has ever since been ready and willing to furnish water by its hydrants to said village, at the rate mentioned in said resolution, and that the plaintiff has never been asked to furnish its hydrants or any water to said village, for any purpose, since the expiration of said contract; that the plaintiff has never refused to
furnish water to said village for fire protection or other
186 purposes and on the contrary thereof aver that at the expira-
tion of said contract the plaintiff refused to renew the same and furnish water at the rate of $40.00 per hydrant per annum, as required by said resolution of said village and said franchise, but insisted that the said village should pay to said plaintiff the sum of $50.00 per hydrant per annum for said water in the future; that said village refused to pay said sum of $50.00 per hydrant, but was then ready and willing to pay said plaintiff $40.00 per hydrant per annum for the use of said water, and to renew said contract for the period of five years at that rate; that said plaintiff refused to furnish water at said price of $40.00 per hydrant per annum, and thereupon cut off the water supply of said village and the use of the hydrants therein; that the defendants and inhabitants of said village thereupon determined to establish a system of water works owned by said village, as they lawfully might, and have since been duly engaged in establishing the same, except so far as they have been restrained by injunctions of this court obtained by the plaintiff.

And the defendants admit that the water the plaintiff furnished is taken from Skaneateles lake, and that no complaint has been made in regard to the character of the water, or in regard to its efficiency for fire purposes or for municipal or sanitary purposes, when the same has been furnished by the plaintiff.

187 And further answering the defendants admit and aver that when said franchise was granted by said village and plaintiff was organized, the village was not supplied with a system of water works, and that it was then authorized and empowered by law, and has ever since been so authorized and empowered, to construct and operate a system of water works of its own, for supplying to itself and its inhabitants pure and wholesome water, and it was then likewise authorized and has ever since been authorized to contract with private companies to furnish to it and its inhabitants pure and wholesome water, at any time said village saw fit to do so.

And said defendants also upon information and belief deny that said village at any time made any election to grant a franchise to a private company or plaintiff instead of establishing works of its own, and also upon information and belief deny that in pursuance of any election on the part of the village it granted the franchise mentioned in the complaint and, also ordering that the plaintiff was organized under and upon the faith of any election on the part of the village to supply itself with water through said plaintiff.

And further answering the defendants upon information and belief deny that in violation of any right, contract or obligation created or existing between the plaintiff and the village of Skaneateles, certain water commissioners were duly appointed on or about the 2nd day of March, 1896, as alleged in said complaint, for the
188 purpose of constructing for said village a water-works system of its own, but they admit and aver that said persons so appointed immediately thereafter duly began to act and have ever since continued to act, and are now acting as such water commissioners, and that they were appointed without notice to the plaintiff.

And further answering said defendants admit on information and belief, that no action has been brought to vacate or annul the franchise of the plaintiff, or to dis-olve the existing relations between plaintiff and the village, but it avers that the said defendants were entitled so to do, and to treat said franchise as rescinded by reason of the failure and refusal of the plaintiff to perform the conditions of said franchise; and also aver upon information and belief that said village, at any and all times since the granting of said franchise, has been lawfully entitled to construct a system of water works of its own, and to furnish water to itself and its inhabitants, and that said plaintiff has not now and never has had since the granting of said franchise, exclusive right to furnish water to said village and its inhabitants.

And further answering the defendants upon information and belief deny that when said contract of said village with the plaintiff expired on February 1, 1896, the said authorities of said village refused and neglected to enter into a contract with said plaintiff to supply to said village any water for the public uses of said
189 village, and also deny upon information and belief that any contract was ever made between the plaintiff and said village, by the petition and franchise of the plaintiff or any action of the village thereunder, except said contract which expired on the 1st day of February, 1896; and upon information and belief aver that

said plaintiff refused to enter into any contract to supply water to said village, except at the rate of $50.00 per hydrant, and in violation of the conditions of said franchise, except that after such refusal and the plaintiff had cut off the water supply of said village, and said village had instituted proceedings to construct water works of its own, said plaintiff offered to supply water to said village for a period of five years, at the rate of $40.00 per hydrant, but refused to supply the same for any less sum.

And the defendants admit and aver upon information and belief that the defendant water commissioners were duly appointed and confirmed, and have ever since acted as such; that a meeting of the electors of said village was duly called by the trustees of said village, in pursuance of the provisions of chapter 181 of the Laws of 1875, and other acts of the legislature, at which meeting the trustees of said village duly proceeded under the provisions of said acts, and duly obtained a vote of the persons entitled to vote under the provisions of the same, in favor of the ballot having printed thereon "For the water taxes," and that after said vote said defendants acting as such water commissioners, have issued or caused to be issued bonds of said village, and have sold the 190 same or some portion thereof, and have entered into a contract to construct for said village a water-works system to be operated by said village on its own account; and that such persons and corporations are now actually engaged in the construction of a system of water works for said village; but they deny on information and belief that any of the said acts of said village were in violation of any franchise, contract or obligation with the plaintiff, or that there was any election made by said village, or that any notice was required to the plaintiff, or any proceedings to vacate or annul the franchise granted to the plaintiff, or that there were any resolutions existing between the plaintiff and said village requiring to be dissolved, or that the proceedings of said village mentioned in the complaint were in violation of section 10 of article 1 of the constitution of the State of New York, and each and every other allegation of that nature in said complaint contained.

And the defendants further deny upon information and belief, that the contract for the operation of water works by said village impairs or destroys the value of any franchise that the plaintiff has with said village.

And the defendants further aver upon information and belief that the resolution adopted by said village authorizing the plaintiff to supply the village and its inhabitants with water, contemplated that the rights conferred by said resolution should not 191 be sold or transferred by the applicants therefor to non-residents of the village of Skaneateles; that in violation of such condition the plaintiff, a domestic corporation, was organized by the persons named in said application; that thereafter, in violation of the conditions of said resolution, the stock of said corporation was sold and transferred to non-residents of the village of Skaneateles; that at the time of the termination of said contract on the 1st day of February, 1896, a majority of the capital stock of the plaintiff had been sold to one Hawley, a non-resident of the village of Skaneateles and of the State of New York, and a majority of the trustees of said plaintiff had become and were non-residents of the village of Skaneateles.

And the defendants further aver that they have not any knowledge or information sufficient to form a belief, as to the allegations contained in the complaint herein, nor hereinbefore denied or admitted, and therefore deny the same.

II.

And for a second and separate answer herein, the defendants aver upon information and belief that the plaintiff ought not to have or maintain this action, because that at the time of the commencement thereof there was another action pending in this court between the same parties for the same relief, and upon the same grounds, 192 which action is still pending and undisposed of, the defendants having answered therein.

Wherefore, defendants demand judgment that the complaint herein be dismissed, with costs.

M. F. DILLON,
Defendants' Attorney.

Office and post-office address, Eckett block, Skaneateles, N. Y.

STATE OF NEW YORK, } *ss:*
County of Onondaga, }

E. Norman Leslie, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action, and the president of the village of Skaneateles; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

E. NORMAN LESLIE.

Sworn to before me, this 20th day of November, 1896.

WM. G. STUART,
Notary Public.

STATE OF NEW YORK, } *ss:*
County of Onondaga, }

193 Edward Whiting, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action, and one of the trustees of the village of Skaneateles; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the defendants E. Norman Leslie, John Connell, Edwin Whitney and Edward Dent are parties united in interest in this action, individually and as officers of the village of Skaneateles.

EDWIN WHITING.

Sworn to before me, this 20th day of November, 1896.

WM. G. STUART,
Notary Public.

STATE OF NEW YORK,
County of Onondaga, } *ss:*

James A. Root, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action, and one of the water commissioners of the village of Skaneateles; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the defendants 194 Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, individually and as water commissioners of the village of Skaneateles, are parties united in interest in the above-entitled action.

JAMES A. ROOT.

Sworn to before me, this 20th day of November, 1896.

WM. G. STUART,
Notary Public.

Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
vs.
THE VILLAGE OF SKANEATELES and Others, Defendants.

On filing the stipulation hereto annexed it is

Ordered, that the above-entitled action be and the same is hereby referred to John W. Hogan, Esq., of the city of Syracuse, N. Y., to hear, try and determine the same.

Enter.

F. H. H.

(Endorsed:) Filed Dec. 5, 1896.

195 Supreme Court.

SKANEATELES WATER WORKS COMPANY
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village and Individually; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village and Individually; Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, Individually, as Water Commissioners of the Village of Skaneateles.

To the supreme court:

The undersigned, duly appointed by an order of this court referee to hear, try and determine the issue in the above-entitled action, respectfully reports:

I have been attended by counsel for the respective parties hereto have heard proofs and allegations, and considered the argument of counsel, and find

As Matters of Fact.

1. That the plaintiff at the several times mentioned and referred to in the complaint in this action was and still is a domestic corporation, organized pursuant to the provisions of chapter 737 of the Laws of 1873, and the acts amendatory of the same and supplemental thereto.

196 2. The defendant, The Village of Skaneateles, is a municipal corporation, the defendant, E. Norman Leslie, is the president of said village, and the defendants John Connell, Edwin Whiting and Edward Dent were at the time of the commencement of this action trustees of said village.

3. That on or about April 5th, 1887, the defendant, The Village of Skaneateles, granted a franchise to the plaintiff herein to maintain and operate within the village of Skaneateles a system of water works for furnishing to said village and its inhabitants pure and wholesome water, upon certain terms and conditions therein referred to, namely:

That the said company should have its works in general operation within said village within two years from the 1st day of December, 1887.

That said company should not charge or collect from said village at any time a greater sum than $40.00 per annum for each hydrant furnished for the use of said village, and that at that rate should furnish all hydrants required by said village at such places as should be designated by its trustees.

That the rights conferred should not be sold or transferred to non-residents of the village of Skaneateles.

4. The village of Skaneateles by resolution of its board of trustees at a meeting regularly and duly held thereafter renewed the franchise theretofore granted to said plaintiff, and extended the time for the completion of the work by said plaintiff of its plant until December 1st, 1890.

197 5. That in or about the year 1889 the plaintiff constructed under and in pursuance of the power so granted a system of water works for supplying the village of Skaneateles and its inhabitants with pure and wholesome water.

Prior to that time the village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own.

That the system of water works so constructed and completed as aforesaid, by plaintiff, was and at all times since has been and now is a complete and adequate system. Said corporation has laid pipes in substantially every street of said village. No complaint has been made that the water furnished by said plaintiff has not been pure and wholesome, or that the sufficiency thereof has not been adequate, or that the pressure thereof has not been adequate for fire protection and all other purposes.

That the source from which said corporation procures its water is

Skaneateles lake, which is the only source from which water can be obtained for supplying and furnishing the village and its inhabitants with pure and wholesome water thus far discovered.

6. That the plaintiff has incumbered its property by two several mortgages, one to secure the payment of $40,000 worth of bonds, executed about the 22nd day of August, 1890; and the other executed about the 1st day of February, 1895, to secure the payment of $10,000 worth of bonds issued by said company, which said bonds and mortgages securing the same are now outstanding against the plaintiff herein.

198 7. That on or about the 1st day of February, 1891, a contract was entered into between the plaintiff and the village of Skaneateles, whereby the plaintiff undertook with said village to supply the water for forty (40) hydrants in said village and for other purposes, for the sum of $30 each per annum; that said contract expired on the 1st day of February, 1896, and was not renewed.

8. That prior to said special election and after the publication of the notice thereof, the plaintiff herein offered to renew the contract with the village of Skaneateles for hydrant rentals according to the price regulated in the first contract, at $40 per hydrant per annum for five years, and at $30 per hydrant per annum for a term of years thereafter.

9. That without any proceeding to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant, Leslie, as president of the village of Skaneateles, did on or about the 21st of March, 1896, appoint the defendants, Hall, Eckett, Root and Shultz, to be water commissioners of the said village, having in contemplation the purpose of constructing for said village a water-works system of its own.

That the said persons so ap-ointed as water commissioners entered upon the performance of their duties, and have been acting as such. The appointment was confirmed by the trustees of said village, and the said water commissioners having duly qualified, caused
199 a meeting of the electors of the village to be called by the
trustees of the village in pursuance of the provisions of chapter 181 of the Laws of 1875, and a vote was taken at said meeting, the result of which was favorable, to municipal ownership, and after said election the said water commissioners issued or caused to be issued bonds of said village to the amount of $30,000 and sold the same for par and accrued interest.

10. That said board of water commissioners of the said village of Skaneateles entered into a contract for the construction of a water-works system for said village, and have expended thereon about the sum of $24,000 and said works are substantially completed.

11. That all of the proceedings were taken without instituting any proceeding to condemn the property of the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property.

12. That the works of the plaintiff were constructed at a large expense, and its property rights and franchise mortgaged to secure its bonds duly issued, and the income of the plaintiff from the oper-

ation of its plant has at various times been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the village of Skaneateles.

As Conclusions of Law.

200 1. The village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a water-works system for the use of said village.

2. The consent of the village of Skaneateles to the organization of the plaintiff as a water works company, and the making of a contract by the village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within said village or the village from constructing and maintaining a water-works system to supply itself with water.

3. Subsequent to February 1st, 1896, no contractual relations existed between the plaintiff and the village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff; but was entitled to construct and maintain a water-works system of its own.

4. The defendants are entitled to judgment herein dismissing the complaint upon the merits with costs, and judgment is ordered accordingly.

JOHN W. HOGAN, *Referee.*

201 Supreme Court, Onondaga County.

The Skaneateles Water Works Company
against
The Village of Skaneateles, E. Norman Leslie, as President of said Village; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles.

The plaintiff, The Skaneateles Water Works Company, makes, files and serves the following exceptions to the report of John W. Hogan, Esq., referee, before whom the issues herein were tried, filed May 25, 1897.

1. Said plaintiff excepts to the conclusion of law numbered 1 in said report, to wit: that "the village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of the water-works system for the use of said village."

2. Said plaintiff excepts to the conclusion of law numbered 2 in said report, to wit: that "the consent of the village of Skaneateles to the organization of the plaintiff as a water works company, and

the making of the contract by the village of Skaneateles with that plaintiff for the supply of pure and wholesome water did not
202 vest in the plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within said village, or the village from constructing and maintaining a water-works system to supply itself with water."

3. Said plaintiff excepts to so much of the conclusion of law numbered 2 in said report as holds that the consent of the village of Skaneateles to the organization of the plaintiff as a water works company and the making of the contract by the village of Skaneateles with the plaintiff for the supply of pure and wholesome water did not prevent the village from constructing and maintaining a water-works system to supply itself with water.

4. Said plaintiff excepts to the conclusion of law numbered 3 in said report, to wit: that "subsequent to February 1, 1896, no contractual relations existed between the plaintiff and the village of Skaneateles and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff, but was entitled to construct and maintain a water-works system of its own."

5. Said plaintiff excepts to so much of the conclusion of law numbered 3 in said report as holds that subsequent to February 1, 1896, the village of Skaneateles was entitled to construct and maintain a water-works system of its own.

6. Said plaintiff excepts to the conclusion of law numbered
203 4 in said report, to wit: that "the defendants are entitled to judgment herein dismissing the complaint upon the merits; with costs. And judgment is ordered accordingly."

GEORGE BARROW,
Plaintiff's Attorney, Skaneateles, N. Y.

To M. F. Dillon, Esq., attorney for defendants; and to the county clerk of the county of Onondaga.

Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, and Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

The issues joined in the above-entitled action having been duly referred to John W. Hogan, Esq., as sole referee to hear and determine by an order of this court in the above action bearing date the 3rd day of December, 1896, and the said referee having duly
204 made and filed his report in writing whereby he finds that the complaint in this action should be dismissed upon the merits with costs to the defendants against the plaintiff.

Now, on motion of M. F. Dillon, attorney for the defendants, it is Ordered and adjudged, that the complaint in this action be, and the same is dismissed upon the merits and that the defendants herein recover of the plaintiff, The Skaneateles Water Works Company the sum of $372.11 taxed costs and disbursements of this action.

GEO. J. YAECKEL, *Clerk.*

Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of *of* said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

205 Please take notice, that the plaintiff appeals to the appellate division (fourth department) of this court from the judgment of this court herein, entered in the office of the clerk of the county of Onondaga on the 17th day of July, 1897, in favor of the defendants, dismissing the complaint in this action and for $372.11, costs and disbursements thereof, and from each and every part of said judgment. This appeal is taken both upon questions of law and upon the facts.

Yours, &c., GEORGE BARROW,
Attorney for Plaintiff and Appellant, Skaneateles, N. Y.

To the clerk of the county of Onondaga, and to M. F. Dillon, Esq., attorney for defendants and respondents.

It is hereby stipulated that the foregoing copies of notice of appeal, judgment-roll, exceptions to the referee's report, and of case and exceptions, are true copies of the originals and of the whole of said originals, filed or entered in Onondaga county clerk's office in the above-entitled action, and further certification thereof is waived.

GEORGE BARROW,
Plaintiff's Attorney, Skaneateles, N. Y.
M. F. DILLON,
Defendants' Attorney, Skaneateles, N. Y.

206 COUNTY OF ONONDAGA, *ss:*

George Barrow, being duly sworn says I am the attorney for the plaintiff in this action. The referee before whom the same was tried, as I am informed and believe, wrote no opinion thereon.

GEORGE BARROW.

Sworn to before me, this 1st day of June, 1898.

F. E. STONE,
Notary Public.

207 Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court in the fourth judicial department, do hereby certify that the following is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding and entered in my office on the 7th day of October, 1898, and that the original case or papers upon which said appeal was heard are hereunto annexed.

[L. S.] In witness whereof I have hereunto set my hand and affixed the seal of said court at the city of Rochester, this 14th day of October, 1898.

NEWELL C. FULTON, *Clerk.*

208 At a term of the appellate division of the supreme court of the State of New York in and for the fourth judicial department at the city of Rochester on the 7th day of October, 1898.

Present: Hon. George A. Hardin, presiding justice. Hon. David L. Follett, Hon. William H. Adams, Hon. Manley C. Green, Hon. Hamilton Ward, associate justices.

THE SKANEATELES WATER WORKS CO., Appellant,
vs.
THE VILLAGE OF SKANEATELES ET AL., Respondents.

The above-named plaintiff and appellant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Onondaga on the 17th day of July, 1897, and the said appeal having been argued by Mr. Charles A. Hawley of counsel for the appellant and by Mr. William G. Tracy of counsel for the respondent and due deliberation having been had thereon it is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed and the respondent recover of the appellant the costs of this appeal. See Syracuse Water Company *vs.* City of Syracuse, 116 N. Y., 167. Matter of City of Brooklyn, 143 N. Y., 596. Warsaw Water Company *vs.* Village of Warsaw, 16 App. Div., 502. Colby University *vs.* Village of Canandaigua, 69 Fed. Rep., 671. The Canandaigua Water Works Company *vs.* The Village of Canandaigua, 90 Hun., 605. 209

All concur.

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Department.

THE SKANEATELES WATER WORKS CO., Appellant,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whitney, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Schultz, as Water Commissioners of the Village of Skaneateles, Respondents.

Judgment October 7th, 1898.

210 The appeal taken by the plaintiff in the above-entitled action to the appellate division of the supreme court of the fourth judicial department from the judgment of the supreme court herein entered in the clerk's office of the county of Onondaga on the 17th day of July, 1897, having been brought on for argument before said appellate division at the term of said division commencing on the 20th day of September, 1898, and said appellate division having made and filed its order and judgment affirming said judgment appealed from with costs to the respondents against the appellant. Now, on motion of Martin F. Dillon, attorney for the respondents it is ordered and adjudged that said judgment appealed from be and the same is hereby affirmed and that the respondents, The Village of Skaneateles, E. Norman Leslie, as president of said village; John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of the village of Skaneateles, recover of the appellant, The Skaneateles Water Works Company, the sum of $81.40, taxed costs and disbursements of said appeal.

GEO. J. YAECKEL, *Clerk.*

Endorsed: Filed Oct. 18, 1898, at 9.20 a. m.

211 Supreme Court, Onondaga County.

THE SKANEATELES WATER WORKS CO., Appellant,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Respondents.

Take notice that the above-named The Skaneateles Water Works Company hereby appeals to the court of appeals from the judgment entered in the office of the clerk of the county of Onondaga on the

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18th day of October, 1898, upon the determination of the appellate division of the supreme court, fourth department for $81.40 costs, and which judgment and determination affirmed a judgment entered in the office of the clerk of the county of Onondaga on the 17th day of July, 1897, dismissing the complaint and for $372.11 costs and disbursements, to the defendants against the plaintiff and 212 from each and every part of said judgment so as aforesaid entered October 7th, 1898.

Dated November 5th, 1898.

Yours, &c.,
GEORGE BARROW,
Att'y for Pl'ff and App'l't.

Office and P. O. address, Skaneateles, N. Y.

To M. F. Dillon, attorney for defendants and respondents, Skaneateles, N. Y., and to George J. Yaeckel, clerk of the county of Onondaga.

(Endorsed:) Filed Nov. 11, 1898.

213 Supreme Court.

THE SKANEATELES WATER WORKS CO., Appellant,
vs.
THE VILLAGE OF SKANEATELES ET AL., Respondents.

ONONDAGA COUNTY, *ss:*

George Barrow, being duly sworn, says he is the plaintiff's attorney in this action; that the appellate division of the supreme court wrote or rendered no opinion herein except as the same is contained in its decision herein, as deponent is advised and believes, and which decision constitutes a part of the record on this appeal.

GEORGE BARROW.

Sworn to before me this 24th day of Dec., 1898.

E. C. MILLER,
Notary Public, Onondaga County.

214 Supreme Court.

THE SKANEATELES WATER WORKS CO., Appellant,
vs.
THE VILLAGE OF SKANEATELES ET AL., Respondents.

It is hereby — that the foregoing is a correct and true copy of the evidence, rulings, exceptions, exhibits, judgment-roll, notice of appeal to the appellate division, order of affirmance of the appellate division, judgment of the supreme court thereon, affidavit of no opinion by the appellate division and notice of appeal to the court of appeals in the above-entitled action, all of which papers have been duly filed in the Onondaga county clerk's office, and that the same shall constitute the true record on which to review this case on appeal.

Dated December 29th, 1898.

M. F. DILLON,
Attorney for Respondents.
GEORGE BARROW,
Attorney for Appellant.

STATE OF NEW YORK, }
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copies of case & exceptions, judgment & notice of appeal with the originals thereof which are now remaining on file in this office, and that the same are correct transcripts of said originals, and of the whole thereof, and of the endorsements thereon.

Seal Onondaga County.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten-cent United States internal-revenue stamp canceled.]

215 PARKER, *Ch. J.:*

The plaintiff, a domestic corporation, organized pursuant to the provisions of chap. 737 of the Laws of 1873, and the acts amendatory thereof and supplemental thereto, brought this action for the purpose of obtaining a permanent injunction against the Village of Skaneateles, its president, trustees and water commissioners (whom, for convenience, we shall refer to in the course of this opinion as the village), restraining them from constructing and operating in the village of Skaneateles an independent system of water works, for the purpose of supplying it and its inhabitants with water.

Such steps were taken on or about the 5th day of April, 1887, by the Village of Skaneateles as, in conjunction with the acts of the plaintiff, operated to vest in the latter a franchise to maintain and operate within its corporate limits a system of water works for furnishing to the village and its inhabitants pure and wholesome water upon certain terms and conditions, which, in effect, were that the company should have its works in general operation by the 1st day of December, 1889; that it should not charge or collect at any time a greater sum than forty dollars per annum for each hydrant; that at such rate it should furnish all the hydrants required by the village, and should not sell or transfer to non-residents of Skaneateles the rights acquired by the granting of the franchise. The works were not completed within the time provided for, but before the expiration of such period the trustees of the village of Skaneateles passed a resolution extending the time for the completion of the works until December 1st, 1890, and declared that thereby the franchise theretofore granted to the plaintiff was renewed. Within the period of time designated by the latter resolution the works were completed and the plaintiff commenced to supply the village and its inhabitants with water and so continued under its contract for a period of about five years, at which time the contract
216 with the village expired and was not renewed. Whether the record discloses the real reason for the refusal of the village to renew the contract is open to doubt, but the evidence indicates

that the plaintiff having found that it had lost money, foolishly asked for ten dollars more per hydrant than it was entitled to charge under the terms of the grant by which the franchise was created. This was the first mistake, but not the only one in the chapter of errors which led to the appointment of a board of water commissioners in pursuance of chapter 181 of the Laws of 1875, who thereupon took the necessary steps to have a special election held for the purpose of voting upon the proposition to construct an independent system of water works for the village. The vote was largely in favor of an independent system, and the water commissioners proceeded at once to secure such a system. The situation presented to the water commissioners is described in the findings of the learned referee as follows: "The system of water works so constructed and completed as aforesaid, by plaintiff, was, and at all times since has been and now is, a complete and adequate system. Said corporation has laid pipes in substantially every street of said village; no complaint has been made that the water furnished by said plaintiff has not been pure and wholesome, or that the sufficiency thereof has not been adequate, or that the pressure thereof has not been adequate for fire protection and all other purposes." They further say that the source from which the plaintiff obtained its water, namely, Skaneateles lake, was the only source from which water could be obtained for supplying and furnishing the village and its inhabitants with pure and wholesome water. Necessarily, therefore, it was apparent that the public health could not be advantaged by an additional system of water works, and that there were no public interests requiring it; and as the statute under which the village was proceeding to acquire a system of water works 217 of its own permitted the acquisition of the plaintiff's water works, rights and franchises by condemnation proceedings, it would seem to the average mind that common fairness, if not common honesty, should have dictated that course. It is true that the village offered to pay to the plaintiff $24,000 for its property, a property mortgaged for $50,000, but the plaintiff declined to take that sum, and instead requested the defendant to take its property by condemnation proceedings, as the statute authorized. So anxious was the plaintiff to have that course taken, that it even offered to pay all the expenses of such a proceeding, except the defendant's counsel fees; but the village could not avail itself of the permission of the statute, or of the invitation of the plaintiff, and for an excuse for such an unconscionable performance says that it might have been compelled by a proceeding in court to pay to the plaintiff something more than the actual cost of duplicating its works; in other words, it feared that the court might hold that the franchise had some value, and that the money lost during the years required to educate the people up to the desirability of taking water should be compensated for.

It is the experience of all attempts to introduce water into villages and small cities that the number of individual patrons at the outset is very small, because their houses are not piped, and they are without bath-tubs and other appliances which go with the use of

water supplied under pressure. The houses erected after the construction of water works are, of course, made ready for connection with the pipes of the company; but the old houses are brought in very slowly; many never come in, while a small percentage of the others are brought in each year, as the owners find themselves able to enjoy the luxury afforded by the water system, or as they may be persuaded that the necessary expense ought to be incurred for reasons of health or comfort. This means in almost all cases
218 losses for the first few years, until a sufficient number of people have become patrons to put the plant on a paying basis. The theory of the defendant seems to be that the proper way to treat such a corporation as the plaintiff, promoted in this instance, as it appears, by defendant's citizens, is to let it go on and build water works, losing money each year while it educates the people up to the point of using the water, until years have passed away and the plant has at last come to a paying basis, and then duplicate its plant and take over a paying business for the simple cost of the construction of new works, and it claims the permission of the legislature to take that very course.

On the other hand, the appellant urges that the statute authorizing villages to supply themselves with water and permitting the acquisition of the works of any private corporation that may be supplying such municipalities with water, also makes it the duty of the water commissioners to acquire the property of the existing corporation or corporations. But after a very careful examination of the statute it seems to us very clear that this is not so.

It is probable that the legislature mistakenly assumed that such authorities would not act unjustly or oppressively, but would recognize the property rights of others. Be that as it may, the right to determine whether the property of an existing water works corporation should be taken or not, is clearly submitted to the determination of the local authorities. The refusal of the defendant, therefore, to acquire the plaintiff's property by proceedings *in invitum* does not tend to support the plaintiff's claim for an injunction. The defendant has done precisely what the statute authorizes, and all that remains for the court to determine is whether the act was within the legislative power, or void because in contravention of the organic law. Our first inquiry naturally is as to the nature of the
219 rights acquired by the plaintiff under and by virtue of the franchise granted to it. The answer is readily to be found in the decisions of this court in Syracuse Water Co. *v.* City of Syracuse (116 N. Y., 167), and Matter of the City of Brooklyn (143 N. Y., 596). Indeed, the principle was settled in Charles River Bridge *v.* Warren Bridge (11 Peters, 548), where it appeared that the legislature of Massachusetts, after passing an act incorporating the plaintiff for a term of years, with power to erect a bridge and collect the tolls, etc., subsequently incorporated the defendant with power to erect another bridge very near the first; the act provided that after the expense of the construction of the first bridge had been reimbursed to its promoters, it should be surrendered to the State and become a free bridge. It was insisted that the act incorporating the

defendant impaired the obligation of the contract between the State and the plaintiff, and was, therefore, in violation of section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts. While the court was divided upon the question whether there could be implied from the contract on the part of the State an agreement not to authorize, contiguous to that of the Charles River bridge, another bridge, which would ultimately become free and thereupon render the plaintiff's bridge of little or no value, the majority of the court agreed that *the contract between the State and the plaintiff was not exclusive*, and that an agreement not to authorize the erection of another bridge could not be implied by reason of the settled rules of construction of statutes adopted under the system of jurisprudence which we have derived from the English law, viz: that public grants are to be construed strictly so as to prevent rights from being taken from the public, or given to a corporation, beyond those which the words of the grant, by their ordinary construction, convey. 220 The doctrine of that case has been accepted by this court and frequently applied, as in Auburn & Cato Plank Road Co. *v.* Douglass (97 N. Y., 444); Chenango Bridge Co. *v.* Binghamton Bridge Co. (27 N. Y., 87); Power *v.* Village of Athens (99 N. Y., 592); Syracuse Water Co. *v.* City of Syracuse (116 N. Y., 167), and Matter of the City of Brooklyn (143 N. Y., 596).

In the Syracuse case, the plaintiff was incorporated by chap. 234 of the Laws of 1849 for the purpose of furnishing water to the city and its inhabitants, and this it did from the time of its creation down to about the time of the commencement of the action, which was brought for the purpose of restraining the defendant, The City of Syracuse, from granting to the Central City Water Company the right to place pipes and other constructions in the city of Syracuse with the view to supply it and its inhabitants with water. The plaintiff's charter provided that it should, when requested, furnish water to the common council of the city for the extinguishment of fires and other purposes, on terms to be agreed upon between them, and in case they should not agree, a provision was made for a determination of the disagreement by commissioners to be appointed by the supreme court; the charter also provided that any time after the expiration of the twenty years the common council should have the right to assume all the property rights, powers and franchises of the company on paying to it an amount to be ascertained by a method prescribed. For nearly forty years the Syracuse Water Company continued to furnish water for the city and its inhabitants, and then, in pursuance of chap. 85 of the Laws of 1880, the Central City Water Company was incorporated, and in its articles of incorporation the object of its creation was declared to be to supply the city of Syracuse and adjacent villages with pure and wholesome water for domestic use, for fire protection and other public 221 purposes. The common council of the city thereupon adopted a resolution authorizing such company to construct and operate water works in the city of Syracuse for the purpose of supplying it and its inhabitants with water.

It was contended by the Syracuse Water Company in this court that the provision in the grant requiring the company on request to furnish water to the municipality, was in legal effect requiring the company to furnish and the city to take water for fire and other public purposes, but it was decided otherwise. The grant to the water company was held to give to it the privilege of supplying all the water that the city or its inhabitants might wish to take, but not with the right to supply them all the water that they might care to use.

The doctrine of that case was adopted and approved in Matter of City of Brooklyn (*supra*), which was a special proceeding instituted for the purpose of acquiring the property and franchises of the Long Island Water Supply Company. The commissioners of appraisal refused to hold that such company had an exclusive right to furnish water to the territory supplied by it. This position was sustained in this court on the ground that the franchise granted was not exclusive.

Under the settled law of this State, therefore, the franchise that the plaintiff here acquired was not exclusive and did not prevent the village from proceeding under the act of 1873, and the acts amendatory thereof, to grant a franchise to another corporation to construct water works in the village, and at the same time contract with it to take such water as the village should need for fire protection and other public purposes. Indeed, the appellant concedes this to be so, but at the same time insists that the attempt of the village to perform such service for itself presents a very different question, for while the effect of granting a franchise to another corporation might be to impair and possibly ultimately to destroy the 222 value of its plant, the construction and operation of water works by the village, it is argued necessarily has that effect, because it takes away the power of the company to supply the village, the latter having placed itself beyond the necessity of being thus supplied; and the village having also undertaken the business of supplying its inhabitants, the power of the company to supply them is at least impaired, and, hence, it is urged that the obligation of its contract is impaired within the meaning of the Federal Constitution.

All franchises come from the State, although the legislature may, and often does, delegate to municipal authorities the right to take final action in the procedure resulting in the creation of a franchise. (Ghee *v.* Northern Union Gas Co., 158 N. Y. 510, 513.) The effect of such action, if within the legislative permission, is to allow the grantee to carry on the business authorized by the franchise. All rights not expressly granted by it are, as we have seen, reserved. The rights thus reserved include in part the granting of a franchise to another corporation to carry on the same business in the same territory. The power to grant the additional franchise, as well as the first one, the municipality acquires from the legislature, which has the power to determine whether the rights reserved upon the grant of the first franchise shall be exercised by a private corporation or by the municipal corporation. It may well be that competition by the municipality more seriously affects the earning capacity of the private corporation than would the competition of another private corporation; but the test of legislative power in such case is not whether the agency selected to construct and operate competing water works is effective or otherwise, but whether the statute providing for the agency also contains provisions assisting it to impair or destroy the property of the private corporation by other means than competition.

We are thus brought to an examination of the statutes, and our
first inquiry will be whether they merely threaten parties
223 in the plaintiff's situation with the consequences of local
municipal competition, or constitute an invasion of their
grants. The former, as we have seen, is permissable. But the latter may not be done; for the doctrine has been settled since the Dartmouth College case (4 Wheat. 518), that a grant of corporate powers by the sovereign to an association of individuals for public use, constitutes a contract within the meaning of the Federal Constitution prohibiting a State legislature from passing laws impairing its obligations. In the recent case of Pearsall *v.* Great Northern R'y Co., (161 U. S. 646), the court, after a brief review of the Dartmouth College case, said: "Subsequent cases have settled the law that wherever charter rights have been acquired by virtue of the corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation." Intermediate the cases cited there are many cases in the Supreme Court of the United States in which the doctrine referred to has been either asserted or made the basis for the decision, as in N. O. Gas Co. *v.* Louisiana Light Co. (115 U. S. 650); N. O. Water Works Co. *v.* Rivers (115 U. S. 674); Louisville Gas Co. *v.* Citizens' Gas Co. (115 U. S. 683). These were cases where the grants were of an exclusive right to supply gas or water to a municipality. That court has taken frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation, and in a series of decisions extending over many years has held that a clause in the contract imposing certain taxes in lieu of other taxes, or all taxes to which the stockholders would be subject, is impaired by legislation raising the rate of taxation or imposing taxes other than those specified in the charter. (N. J. *v.* Wilson, 7 Cranch, 164; State Bank of Ohio *v.* Knoop, 16 How.
(U. S.) 369; Dodge *v.* Woolsey, 18 How. (U. S.) 331; McGee
224 *v.* Mathis, 4 Wall. 143; Farrington *v.* Tenn., 95 U. S., 679;
Asylum *v.* New Orleans, 105 U. S., 362.)

In People *v.* O'Brien (111 N. Y. 1), the court at page 51 said, "An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void." That this contract is protected by the Constitution from destruction or impairment by legislation intended to accomplish that result either directly or indirectly is established by the authorities to which reference has been made.

Whether the plaintiff's contract is impaired by the legislature under which the defendant has established its water works, will now be considered.

We have already said that such legislation was not in excess of the power of the legislature in so far as it granted to the villages of the State the right to construct and operate water works, notwithstanding the existence in such villages of a private corporation engaged in the same business, which obtained its franchise under the act of 1873. But the appellant contends that chapter 181 of the Laws of 1875 and the acts amendatory thereof and supplemental thereto, under which the defendant has proceeded to construct water works of its own, authorizes the village, as its competitor, to tax the plaintiff company in the event that the net water receipts are not sufficient to pay interest and principal as they become due. Thus it may be compelled to contribute towards the cost of the construction and maintenance of the water works of its competitor, and, in addition a system of water taxes is devised by which tax-payers who are customers of the plaintiff corporation may be discriminated against and thus compelled through self-interest to cease taking water from the
plaintiff and take that of the defendant instead. Section 16 of
225 the act provides: "In case the entire annual receipts for water
rents, after deducing as in the preceding section provided, shall, in any year, not be sufficient to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be sufficient to pay said principal, * * *" shall "cause such deficiency to be assessed, levied and collected from the taxable property of said village. * * *" By chapter 507 of the Laws of 1889 authority was conferred upon the boards of water commissioners, acting under chapter 181 of the Laws of 1875, to establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the water pipes are laid. This section was amended by chapter 662 of the Laws of 1893, so as to authorize boards of water commissioners to "establish a scale of rates for the use of water and also rates for fire protection to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes." By chap. 284 of the Laws of 1894 it was further amended, so as to read as follows: "Boards of water commissioners * * * may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes."

It is difficult to conceive of a more ingenious and effective device to deprive the plaintiff of its customers than the provision of the

statute which we have just quoted. The development of the
226 law upon that subject is interesting, but we shall not stop to
discuss it, as the provisions we have quoted seem to make
their own comment.

The provision of the act of 1894 had become incorporated into the act of 1875, before this defendant organized and proceeded in the construction of its works under the latter act. By it we perceive the water commissioners are authorized to "establish a scale of rates for the use of water, and also rates for fire protection, to be assessed upon all real property abutting on the mains or within two hundred feet of the hydrants," or the commissioners may ignore such limitations altogether and create others, which may, if they so determine, coincide with the corporate limits, and further they may confine the assessment to real property upon which the water is not used by the owners or occupants thereof for domestic or manufacturing purposes; for the statute provides as an alternative or a substitute for an assessment on all real property abutting on the mains or within two hundred feet of the hydrants, than an assessment may be made "on such real property so abutting or within such distance as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes." Who can doubt that a board of water commissioners that would refuse to take such a plant as the plaintiff's by proceedings *in invitum*, and thereby necessarily at its fair valuation, would not hesitate to make use of the discretion so broadly conferred, in order to secure all of the patrons of the private company, or that they would find it at all difficult to determine that it would be "beneficial" to assess a large part of the cost of fire protection upon the inhabitants who had opposed their plan as destructive of property and wasteful, and had continued to take water from the private
corporation as a matter of principle? And, again, who can
227 doubt that the villagers would expect to be discriminated
against should they refuse the request of canvassers to become
customers of the board of water commissioners? An attempt to exercise the authority sought to be conferred by this provision of the statute would necessarily deprive a private corporation of all its customers, and, as a result, the business of such corporation would be absolutely destroyed, a business which the law assured it at the time of its incorporation should not be interfered with otherwise than by competition.

If the provisions of the statute authorizing the taxation of the plaintiff for the payment of the obligations incurred in the construction of the defendant's water works, and the provision authorizing a discriminating tax against its patrons are so connected with the purpose of the act and the object in view that it cannot be said that they do not constitute an essential part of the scheme of the act, then it should be held to be in contravention of section 10 of the Federal Constitution and void. It is, however, a well-settled principle of construction that where the void provisions are separable from those that are lawful, and those that remain are capable of being executed, the valid provisions will not be condemned, because of the unconstitutionality of other provisions not absolutely essential to the main purpose of the act. (Matter of N. Y. & L. I. Bridge Co., 148 N. Y. 540, 554, and cases cited.) It is obvious that the offending provisions do not constitute essential feature- of the act of 1875, as amended.

Indeed, the discriminating feature of the act of 1894 did not become incorporated into the original act until nearly nineteen years after its passage, and the elimination of that feature of the statute will in nowise interfere with the just and proper working out of the general purposes of the act, which is to enable municipalities to provide for an independent system of water works, to be owned and controlled by the municipal authorities. Neither is it an
228 essential part of the scheme that the plaintiff's property
should be taxed to pay for the construction and maintenance of the defendant's water works. Abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation, without assessing the property of the plaintiff for such purposes, but we are of the opinion that in view of the public interests involved (for many municipalities have constructed independent water works under this statute) the rule should be invoked which authorizes the elimination of the provisions of a statute which, if allowed to remain, would condemn it, where it can be done without interference with the general plan and scope of the act.

The judgment should be affirmed, with costs.

229 BARTLETT, *J.* (dissenting):

In this action the plaintiff sues in its own right, and not as a taxpayer of the village.

The legal questions involved are of great general importance and affect a very large amount of invested capital.

The argument, as set forth in the able briefs of counsel on both sides, has taken a wide range, but in my opinion there is one controlling question that is decisive of this case.

In order to state this question intelligently, a reference to the legal situation is important.

In 1873, the legislature enacted the general law for the formation of water companies. (Laws 1873, chap. 737.) That act has been amended from time to time (particularly Laws 1885 chap. 422).

The policy of this legislation has a most important bearing on the question under consideration. While the statute of 1873 is in form a general law authorizing the formation of water companies, it contains a limitation that permits the organization of a corporation thereunder only when the local authorities of the village interested have given their consent.

In 1875 (chap. 181), the legislature passed a law authorizing the villages of the State to furnish the municipalities and their inhabitants with pure and wholesome water.

This statute provides, in detail, how a village may organize and conduct a corporation and water system of its own.

It further provides (§ 22) that if it shall become or be deemed necessary by the board of water commissioners, they may institute condemnation proceedings to acquire the rights, privileges, grants and properties of an existing corporation.

This is optional with the village authorities only, and the existing company has no power to compel the water commissioners to purchase or condemn its rights and property.

In 1887 the trustees of the village of Skaneateles, as authorized by the act of 1873, as amended, granted to the plaintiff
company the consent or franchise to perfect its organization
230 and supply the village and its inhabitants with water.

In 1889 the works were completed and the plaintiff entered upon the performance of its corporate duties.

In 1896 proceedings were instituted which resulted in the village of Skaneateles availing itself of the provisions of the act of 1875 (chap. 181), and it is now conducting a corporation and water system of its own.

The municipal company failed to avail itself of the right to acquire the property of the old company under condemnation proceedings. In this case, as in ma-y others, the old company has ceased to pay expenses, and it is only a question of time when its bonds and stock will be worthless. Before considering the legal position of the village under the state of facts disclosed by this record, it may be well to inquire as to the legitimate risks assumed by the incorporators of the plaintiff at the outset.

I am of the opinion that the plaintiff did not acquire an exclusive right, under the act of 1873, to supply water to the village of Skaneateles, and its inhabitants. (Matter of City of Brooklyn, 143 N. Y., 596.) I think the plaintiff took the risk of the village authorities, at any future time, granting permission to private parties to form another water company and allowing it to furnish water to the municipality for public use as well as to the inhabitants.

If there is no exclusive right in the plaintiff, and if the village is free to permit the formation of as many corporations by private parties as they may deem proper, we have a situation where the freest competition is permitted and no monopoly exists.

All who embark in business ventures are bound to consider in advance that their investment of capital is subject to the peril of close and oftentimes successful competition. The vice of monopoly
is that it escapes competition to the detriment of the con-
231 sumer.

We come then to the controlling question in this case. Is it competent for the legislature to authorize a village to organize a water company of its own to furnish water for private and public use when its trustees have previously granted a consent, or franchise, for a private corporation to do the same thing, without requiring the village, either by purchase, or condemnation proceedings, to acquire the rights and property of the old company?

I am of the opinion that the legislature has no such power, and the act of 1875 is, in that respect, unconstitutional, as depriving the plaintiff of property without just compensation or due process of law and denying to it the equal protection of the laws.

It seems very clear that a municipal corporation, standing in the position of the village of Skaneateles, in this record, cannot engage in the business of furnishing water to itself and its inhabitants and drive the corporation that was organized by its consent to do the same business, into bankruptcy.

If this was accomplished by fair and legal competition that would be the end of the matter, as no valid objection could be made. The foundation of the argument to the contrary is that the municipality does not stand on an equal footing with the old company and invite it to fair and open competition.

In the first place it controls its own patronage as to furnishing water for public use, which is a considerable source of revenue to the existing company.

The latter, if competing with a new private company in this regard, would have an equal opportunity of obtaining the contract from the village as it would go to the lowest bidder, but not so where the latter organizes a company.

Again, the village has the power to impose a tax upon the
232 property of the existing company as a tax-payer to raise a fund
to build the plant of the municipal corporation, and to make
good from time to time any deficit in the conduct of its business.

Furthermore, the village has the power to establish a scale of rates for the use of water, and also rates for fire protection to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, the owners and occupants of which do not use the water for domestic or manufacturing purposes. (Laws 1889, chap. 507, as amended by Laws 1893, chap. 662.) Any patrons the old company retains will be driven at once into the municipal company by this tax. This assessment of rates for fire protection was properly designed to compel the non-consumer to contribute for benefits and protection enjoyed, but it will incidentally require the patrons of the old company to associate themselves with its municipal successor.

In view of the facts stated, it is obvious that the municipal water company is in no legal sense the ordinary competitor of the old company, but is armed with powers that will inevitably drive the latter from the field, and its bondholders and stockholders be subjected to a total loss of all capital invested. This is not competition,—it is annihilation.

As before stated, this litigation affects a very large amount of invested capital, aside from the case at bar, and the question is whether a court of equity is powerless to prevent the utter destruction of this property, or can it invoke legal principles which will do justice between the parties.

It seems to me that there is but one course to be pursued; the property of the old company should be purchased by private contract or condemned under the statute before the municipal water company is permitted to begin work on its plant.

When the town of New Lots was annexed to the city of
233 Brooklyn, the latter was prohibited from supplying water to the territory included in the town until the expiration of the charter of the water company, or until the city should purchase or acquire its property. (Laws of 1886, chap. 335, § 4.) The course suggested is the only one that can even approximate justice in the situation now presented. The old company, with a large bonded indebtedness that has been increased by reason of losses incurred during the early years of the venture, is sure to suffer financially even after a fair and honest condemnation proceeding.

In the case before us the old company first undertook the task of supplying a country village with water and encountered the usual experience of the few taking it and the many refusing it. The general, popular appreciation of the fact that a water company offers for a comparatively small sum of money an abundant supply of pure and wholesome water for domestic and sanitary purposes, is a matter of slow growth in a small country village, and the capitalists who embark in the enterprise suffer losses at the outset.

It is simple and obvious justice that the municipal corporation, before availing itself of the work and losses of the pioneer company, should acquire its property by purchase or condemnation proceedings. To hold that one of the powers the legislature has placed in the hands of the village, by which the plaintiff has been partially destroyed, is unconstitutional, avails nothing when others equally potent are allowed to stand to the utter destruction of the old company.

There is nothing in precedent, as I read the cases, to prevent a court of equity from granting relief in that large class of cases, of which this is one.

I vote for reversal.

All concur with Parker, Ch. J., for affirmance, except Bartlett, J., who reads dissenting opinion, and Haight, J., not voting.

Judgment affirmed.

234 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 5th day of December, in the year of our Lord one thousand nine hundred and nine, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge, presiding.
W. H. SHANKLAND, *Clerk.*

Remittur December 6th, 1899.

235 THE SKANEATELES WATER WORKS COMPANY, Appellant,
ag'st
THE VILLAGE OF SKANEATELES and Others, Respondents.

Be it remembered, that on the 10th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, The

Skaneateles Water Works Company, the appellant in this action, came here into the court of appeals, by George Barrow, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the fourth judicial department.

And The Village of Skaneateles and others, the respondents, in said action, afterwards appeared in said court of appeals, by M. H. Dillon, their attorney, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

236 Whereupon, the said court of appeals, this cause having been submitted by counsel for the respective parties and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondents recover against the appellant with costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

237 Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such cases, made and provided to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *December 6th*, 1899.

[L. S.] I, hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

W. H. SHANKLAND, *Clerk.*

(Endorsed:) Filed Dec. 14, 1899, 2.05 p. m.

STATE OF NEW YORK, }
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of a remittitur from court of appeals, with the original thereof on file and now remaining in this office, and that the same is — correct transcript of

Seal Onondaga County.

said original, and of the whole thereof, and of the endorsements thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 25 day of July, 1900.

{ Ten cent United States internal-revenue stamp, canceled Jul- 25, 1900. G. J. Y. }

GEO. J. YAECKEL, *Clerk.*

238 At a special term of the supreme court held in and for the county of Onondaga at the court-house in the city of Syracuse, N. Y., on the 9th day of December, 1899.

Present: Hon. Frank H. Hiscock, J. S. C.

THE SKANEATELES WATER WORKS CO., Appellant,
against
THE VILLAGE OF SKANEATELES, E. NORMON LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Respondents.

The above-named plaintiff having appealed to the court of appeals from the judgment of the appellate division, fourth department, of this court, entered in this action on the 18th day of October, 1898, affirming the judgment entered therein on the 17th day of July, 1897, in the office of the clerk of the county of Onondaga, and the court of appeals having heard said appeal, and ordered and adjudged that the judgment so appealed from be affirmed, and judgment entered for defendants with costs, and the record remitted from that court having been filed, and an order having been entered thereon, making the judgment of the court of appeals the judgment of this court and directing the entry of judgment of affirmance herein with costs of said appeal against the defendant- to be taxed.

Now on motion of M. F. Dillon, attorney for the defendant it is

Adjudged: that the judgment in this action entered on the 18th day of October, 1898, be and the same is hereby affirmed.

And it is further adjudged that the defendants recover of 239 the plaintiff the sum of one hundred forty-six & $\frac{13}{100}$ dollars their costs herein as taxed and that they have execution against said plaintiffs therefor.

GEO. J. YAECKEL, *Clerk.*

(Endorsed:) Filed Dec. 14, 1899, 2.05 p. m.

STATE OF NEW YORK,
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify

Seal Onondaga County. that I have compared the foregoing copy of a judgment of Sp. Ct. on remittitur with the original thereof on file and now remaining in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 25 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Jul- 25, 1900. G. J. Y. }

240 To the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York:

And now comes the Skaneateles Water Works Company, by George Barrow, its attorney, and complains that in the record and proceedings, and also in the rendition of a judgment — a plea in a suit between the said Skaneateles Water Works Company, plaintiff, and The Village of Skaneateles, E. Norman Leslie as president of said village; John Connell, Edward Whiting, Edward Dent, as trustees of said village; and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of the village of Skaneateles, defendants, which is in the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, the said court of appeals having rendered a decision affirming the said judgment theretofore rendered in the supreme court of the State of New York on the 7th day of October 1898, affirming the judgment of the special term of the said supreme court rendered on the 17th day of July, 1897, against the plaintiff and in favor of the defendants, for the sum of eighty-one dollars and ten cents costs, and dismissing the plaintiff's complaint, which judgment and decision of the said court of appeals was remitted to the said supreme court, county of Onondaga, and such judgment of the court of appeals made the judgment of the said supreme court, and entered in the clerk's office of the said county of Onondaga on the 14th day of December, 1899, and for the sum of one hundred forty-six dollars and fifteen cents ($146.15), wherein was drawn in question the validity of a statute of
241 said State of New York and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, all of which appear in the records and proceedings in said suit, manifest error hath happened, to the great damage of the said The Skaneateles Water Works Company, plaintiff.

Wherefore, the said The Skaneateles Water Works Company, by its attorney aforesaid, prays for the allowance of a writ of error and such other process as may cause the said error to be corrected by the Supreme Court of the United States.

GEORGE BARROW,
Attorney for the Skaneateles Water Works Company, Plaintiff.

(Endorsed:) Read on application for writ of error. Alton B. Parker, chief judge court of appeals State of New York. Filed June 29, 1900.

STATE OF NEW YORK, }
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of a petition with the original thereof on file and now remaining in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

Seal Onondaga County.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten-cent United States internal-revenue stamp, canceled.]

242 [Endorsed:] Court of appeals. The Skaneateles Water Works Company, plaintiff in error *vs.* The Village of Skaneateles *et al.* defendants in error. (Ex.) Petition for writ of error. George Barrow, attorney for plaintiff in error, office and post-office address, Skaneateles, N. Y.

243 Court of Appeals of New York.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

In this cause application having been made to the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York, that being the highest court of record in this State in which said cause can be heard, for an allowance of a writ of error to remove said cause to the Supreme Court of the United States for review, in accordance with the Constitution and laws of the United States and the rules and practice of the Supreme Court of the United States, and for the fixing and approving of the bond on the removal of said cause to the Supreme Court of the United States, it is hereby ordered that said writ of error be, and the same is hereby, allowed, and the same may be issued by any officer authorized to issue the same, and the penalty in the bond is hereby fixed at the sum of one thousand dollars, with the Lawyers' Surety Company of New York City as surety thereon.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

(Endorsed:) Entered June 29, 1900.

STATE OF NEW YORK, } ss:
Onondaga County Clerk's Office, }

Seal Onondaga County.

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of an order with the original thereof entered and now remaining in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten cent United States internal-revenue stamp, canceled.]

244 [Endorsed:] Court of appeals. The Skaneateles Water Works Company, plaintiff in error, *vs.* The Village of Skaneateles *et al.*, defendants in error. (Ex.) Order allowing writ of error. George Barrow, attorney for plaintiff in error, office and post-office address, Skaneateles, N. Y.

245 In the Court of Appeals of the State of New York.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff,
against
THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, as President of said Village; John Connell, Edwin Whiting, Edward Dent, as Trustees of said Village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as Water Commissioners of the Village of Skaneateles, Defendants.

The plaintiff above named, The Skaneateles Water Works Company, assigns the following errors in the final decision of this court duly filed herein on the 5th day of December, 1899.

I. The court erred in holding and deciding that the plaintiff was not entitled to the remedy and relief asked for and sought in its complaint and in affirming the judgment of the supreme court denying to the plaintiff the relief demanded in its complaint, and dismissing the plaintiff's complaint with costs.

II. The court erred in not ordering and adjudging that the judgment of the supreme court dismissing the complaint be reversed and that the relief demanded by such complaint be granted, and the defendants restrained by injunction from the performance of the acts complained of.

246 III. The court erred in denying to the plaintiff the rights claimed by it in its complaint under section 10 of article I of the Constitution of the United States, and in denying to the plaintiff any relief on that ground.

IV. The court erred in not holding and adjudging that the acts of the defendants sought to be restrained were contrary to the provisions of section 10 of article I of the Constitution of the United States, securing to the plaintiff the validity of its contracts made with the defendants under the laws of the State of New York.

V. The court erred in denying to the plaintiff the rights claimed by it under section 1, of the fourteenth amendment to the Constitution of the United States, and denying to the plaintiff any relief on that ground.

VI. The court erred in not holding and adjudging that the acts of the defendants sought to be restrained were contrary to the provision of said fourteenth amendment to the Constitution of the United States, securing to the plaintiff the equal protection of the laws, and denying to the State of New York the right to deprive plaintiff of its property under any statute of its legislature without due process of law.

VII. The court erred in not holding and adjudging that the acts of defendants sought to be restrained were contrary to the provisions of article V, of the amendments to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, and that private property shall not be taken for a public use without just compensation.

VIII. The court erred in deciding in favor of the validity of the statutes of the State of New York and the authority exercised under said statutes by the defendants pursuant to which the 247 acts complained of were performed by the defendants notwithstanding the fact that their validity was drawn in question on the ground of their being repugnant to the Constitution of the United States.

Wherefore plaintiff herein prays for a reversal of the judgment entered herein.

GEORGE BARROW,
Attorney for Plaintiff in Error, Skaneateles, N. Y.

(Endorsed:) Filed June 29, 1900.

STATE OF NEW YORK, }
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of an assignment of error with the original thereof on file and now remaining in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

Seal Onondaga County.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten-cent United States internal-revenue stamp, canceled.]

248 [Endorsed:] Court of appeals. The Skaneateles Water Works Company, plaintiff in error, *vs.* The Village of Skaneateles *et al.*, defendants in error. Assignment of errors. George Barrow, attorney for plaintiff in error, office and post-office address, Skaneateles, N. Y.

249 Know all men by these presents, that we, The Skaneateles Water Works Company, as principal, and The Lawyers' Surety Company of New York City, as surety, are held and firmly bound unto the Village of Skaneateles, E. Norman Leslie, as president of said village, John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of said village, in the full and just sum of one thousand dollars, to be paid to the said The Village of Skaneateles, E. Norman Leslie, as president of said village, John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of said village, their certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally, by these presents.

(5-cent rev. stamp canceled.)

Sealed with our seals and dated this 28th day of June in the year of our Lord nineteen hundred.

Whereas, lately at a session of the court of appeals of New York in a suit depending in said court, between The Skaneateles Water Works Company, plaintiff, and The Village of Skaneateles, E. Norman Leslie, as president of said village, John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of said village, defendants, a decision was rendered against the said plaintiff affirming the judgment of the supreme court of the State of New York, dismissing the plaintiff's complaint and the said plaintiff, The Skaneateles Water Works Company, having obtained a writ of error and filed a copy thereof in the clerk's office of Onondaga county, New York, to reverse the decision and judgment
250 in the aforesaid suit, and a citation directed to the said The Village of Skaneateles, E. Norman Leslie, as president of said village, John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of said village, having been duly issued citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Skaneateles Water Works Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

SKANEATELES WATER WORKS CO.,
By J. W. HAWLEY, *President.*

[Seal of Water Co.]

THE LAWYERS' SURETY COMPANY
OF NEW YORK,
By THOMAS HUNT, 2*d Vice-Pres't.*

Sealed and delivered in presence of—
LYDIA G. ALLEN,
E. H. HALL,
As to Water Co.
H. G. HUNTON,
As to L. S. Co.

[Seal of Surety Co.]

Attest: LOUIS E. KUSTER,
Acting Secretary.

251 STATE OF NEW YORK, *County of New York,* } *ss:*

On the 28 day of June, in the year 1900, before me personally came Thomas Hunt to me known who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he is the 2d vice-president of the Lawyers' Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893.

H. G. HINTON,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

At a stated meeting of the board of directors of the Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34 and 36 Liberty street, in said city, on the 21st day of April, 1897, on motion, it was unanimously—

"Resolved, That the president, the vice-president, the acting president or the second vice-president be, and either of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of the company, and to attach thereto the seal of the corporation, the same to be attested by the secretary or the acting secretary."

252 COUNTY OF NEW YORK, *ss:*

I, Joel Rathbone, secretary of the Lawyers' Surety Company of New York, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and the whole of said original resolution.

Given under my hand and seal of the company at the city of New York, this 28th day of June, 1900.

[Seal of Company.]

LOUIS E. KUSTER,
Acting Secretary.

This bond is approved as to form, amount and sufficiency of surety.

July 9th, 1900.

ALTON B. PARKER,
Ch. J., Court of Appeals, New York.

(Endorsed:) Filed July 13, 1900.

STATE OF NEW YORK,
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of a bond with the original thereof on file and now remaining of record in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

Onondaga County Seal.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten-cent United States internal-revenue stamp, canceled.]

253 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of New York before you, or some of you, upon the decision and judgment of the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had, which decision and judgment was thereafter duly remitted to and made the judgment of the said supreme court and entered in the clerk's office of Onondaga county, New York, on the 14th day of December 1899, in the suit between The Skaneateles Water Works Company, plaintiff, and The Village of Skaneateles, E. Norman Leslie, as president of said village; John Connell, Edward Whiting, Edward Dent, as trustees of said village; and Lemuel D. Hall, Edward Eckett, James A. Root and John L. Shultz, as water commissioners of the village of Skaneateles, defendants, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity:—a manifest error hath happened to the great damage of the said The Skaneateles Water Works Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, 254 you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America at the city of Utica in the northern district of New York, the 22d day of June, in the year of our Lord nineteen hundred, and of our Independence the one hundred and twenty-fourth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the United States Circuit Court,
Northern District of New York,
By C. W. HIGGISON, *Deputy.*

Allowed by—
ALTON B. PARKER,
Chief Judge of the Court of Appeals of New York.

255 [Endorsed:] Court of appeals. The Skaneateles Water Works Company plaintiff in error *vs.* The Village of Skaneateles *et al.* defendants in error. Writ of error. George Barrow, attorney for plaintiff in error, office and post-office address, Skaneateles, N. Y. Entered June 29 1900.

256 UNITED STATES OF AMERICA, *ss:*

To the Village of Skaneateles, E. Norman Leslie, as president of said village; John Connell, Edwin Whiting, Edward Dent, as trustees of said village, and Lemuel D. Hall, Edward Eckett, James A. Root, and John L. Shultz, as water commissioners of the village of Skaneateles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the office of the clerk of the county of Onondaga at Syracuse, N. Y., being the office of the clerk of the supreme court of the State of New York, in a suit wherein The Skaneateles Water Works Company was plaintiff in error, and you are defendants in error, to show cause, if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York, this 22d day of June, in the year of our Lord nineteen hundred.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

257 Court of Appeals.

THE SKANEATELES WATER WORKS COMPANY, Plaintiff in Error,
vs.
THE VILLAGE OF SKANEATELES ET AL., Defendants in Error.

STATE OF NEW YORK,
County of Onondaga, } *ss:*

Edward C. Miller, being duly sworn, deposes and says that he resides at Skaneateles, N. Y., that he is of the age of twenty-one years and upwards; that on the 14th day of July, 1900, at Skaneateles in the county of Onondaga, State of New York, he served the annexed citation on M. F. Dillon, attorney for the defendant in error, by delivering to and leaving with said M. F. Dillon a true and correct copy thereof; that deponent knew said M. F. Dillon to be the person described in said citation as attorney for defendant in error in the above-entitled action.

EDWARD C. MILLER.

Subscribed and sworn to before me this 14th day of July, 1900.

[L. S.] J. HORATIO EARLL,
Notary Public.

(Endorsed:) Filed July 18, 1900.

STATE OF NEW YORK,
Onondaga County Clerk's Office, } *ss:*

I, George J. Yaeckel, clerk of said county, and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of an affidavit with the original thereof on file and now remaining in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon.

Seal Onondaga County.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 20 day of July, 1900.

GEO. J. YAECKEL, *Clerk.*

[Ten-cent United States internal-revenue stamp, canceled.]

258 [Endorsed:] Court of appeals. The Skaneateles Water Works Company, plaintiff in error, *vs.* The Village of Skaneateles *et al.*, defendants in error. Citation. George Barrow, attorney for plaintiff in error, office and post-office address, Skaneateles, N. Y. Filed June 29, 1900.

Endorsed on cover: File No. 17,870. New York supreme court. Term No. 134. The Skaneateles Water Works Company, plaintiff in error, *vs.* The Village of Skaneateles, E. Norman Leslie, as president of said village, *et al.* Filed August 13th, 1900.

134

[illegible]

No. [illegible]

THE SKANEATELES WATER WORKS COMPANY,

Plaintiff in Error,

against

THE VILLAGE OF SKANEATELES, [illegible] MAN [illegible], a Trustee [illegible] et al.,

Defendants in Error.

Brief of Skaneateles Water Works Company.

CHARLES A. HAWLEY,
GEORGE BARROW,
Counsel for Plaintiff in Error.

[illegible] Law Case Printer [illegible]
SYRACUSE, N. Y.
[illegible]

SUPREME COURT,

OF THE

UNITED STATES.

THE SKANEATELES WATER WORKS COMPANY,

Plaintiff in Error.

against

THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE as President of said Village; JOHN CONNELL, EDWIN WHITING, EDWARD DENT, as Trustees of said Village, and LEMUEL D. HALL, EDWARD ECKETT, JAMES A. ROOT and JOHN L. SHULTZ, as Water Commissioners of the Village of Skaneateles,

Defendants in Error.

STATEMENT OF CASE

(Rule 21.)

This was an action begun in the Supreme Court of the State of New York by the service of a summons and complaint Oct. 29th, 1896. Issue was joined by the service of an answer Nov. 20, 1896. The issues were referred to one John W. Hogan, Referee, to hear, try and determine. Subsequently a trial was had before the said Referee and the said Referee thereafter made his report and decision, found at pages 92, *et seq.*, of the record.

Subsequently upon the findings and conclusions of the referee, judgment was duly entered in the said Supreme Court of the State of New York, dismissing the complaint with costs. (Record, page 96).

The plaintiff having, in the meantime, duly excepted to the Referee's conclusions of law (record 95, *et seq.*) appealed from such judgment to the Appellate Division of the Supreme Court of the State of New York, Fourth Department, in which Court the said judgment was affirmed, (record 98) and judgment of affirmance was entered in the proper office Oct. 7, 1898.

No opinion was written by said Appellate Division, (record page 100) except as the same appears in the decision, (record 98).

From such judgment of affirmance an appeal was duly taken to the Court of Appeals of the State of New York (record 99) which was subsequently argued in said Court and was therein decided December 5th, 1899. Said Court of Appeals affirmed the said judgment of the said Appellate Division of the Supreme Court (record 112, 113) and duly remitted the record into the said Supreme Court of the State of New York according to the form of the statutes of the said State of New York, to be enforced according to law, (record 113).

Thereafter at a term of the said Supreme Court of the State of New York held at the City of Syracuse, N. Y., on Dec. 9, 1899, upon the remittitur aforesaid,—the aforesaid judgment of the said Supreme Court of the State of New York was duly affirmed with costs, (record 114) to which court the writ of error herein was thereafter issued (record 121), the same having been allowed by the Honorable Alton B. Parker, chief Judge of the Court of Appeals of the State of New York, (record 116). The writ of error herein is printed at page 121 of the record.

The action was brought to obtain a permanent injunction against the defendants. A temporary injunction was obtained with an order directing defendants to show cause why the same should not continue in full force until final judgment. The act sought to be enjoined was the construction and operation by the Village of Skaneateles of an independent system of water works for supplying itself and its inhabitants with water. At the time of the commencement of the action, the village had issued no bonds, and had expended no money in such construction, but was taking the preliminary steps looking to the construction of such a plant and its operation.

The Court after hearing the arguments of counsel, denied the application for an injunction, and the defendants thereafter, at once, proceeded with the construction of its plant and subsequently completed it.

The facts found by the referee before whom the action was tried, to which neither the plaintiff nor defendants filed any exceptions, appear in the record, page 92, *et seq.* but for the convenience of the Court, are here restated as follows:

"1. That the plaintiff at the several times mentioned and referred to in the complaint in this action was and still is a domestic corporation, organized pursuant to the provisions of Chapter 737 of the Laws of 1873, and the Acts amendatory of the same and supplemental thereto.

2. The defendant, the Village of Skaneateles, is a municipal corporation: the defendant, E. Norman Leslie, is the president of said village, and the defendants, John Connell, Edward Whiting and Edward Dent were at the time of the commencement of this action trustees of said village.

3. That on or about April 5th, 1887, the defendant, the Village of Skaneateles, granted a franchise to the plaintiff herein to maintain and operate within the Village of Skaneateles a system of water works for furnishing to said village and its inhabitants pure and wholesome water, upon certain terms and conditions therein referred to, namely:

That the said company should have its works in general operation within said village within two years from the 1st day of December, 1887.

That said company should not charge or collect from said village at any time a greater sum than $40.00 per annum for each hydrant furnished for the use of said village, *and that at that rate should furnish all hydrants required by said village at such places as should be designated by its trustees.*

That the rights conferred should not be sold or transferred to non-residents of the Village of Skaneateles.

4. The Village of Skaneateles, by resolution of its board of trustees, at a meeting regularly and duly held thereafter renewed the franchise theretofore granted to said plaintiff, and extended the time for the completion of the work by said plaintiff of its plant until December 1st, 1890.

5. That in or about the year 1889, the plaintiff constructed under and in pursuance of the power so granted, a system of water works for supplying the Village of Skaneateles and its inhabitants with pure and wholesome water.

Prior to that time the Village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own.

That the system of water works so constructed and completed as aforesaid, by plaintiff, *was and at all times since has been and now is a complete and adequate system. Said corporation has laid pipes in substantially every street of said village, no complaint has been made that the water furnished by said plaintiff has not been pure and wholesome, or that the sufficiency thereof has not been adequate, or that the pressure thereof has not been adequate for fire protection and all other purposes.*

That the source from which said corporation procures its water is Skaneateles lake, which is the only source from which water can be obtained for supplying and furnishing the village and its inhabitants with pure and wholesome water, thus far discovered.

6. That the plaintiff has encumbered its property by two several mortgages, one to secure the payment of $10,000 worth of bonds, executed about the 22nd day of August, 1890; and the other executed about the first day of February, 1895, to secure the payment of $10,000 worth of bonds issued by said company, which said bonds and mortgages securing the same, are now outstanding against the plaintiff herein.

7. That on or about the 1st day of February, 1891, a contract was entered into between the plaintiff and

the Village of Skaneateles, whereby the plaintiff undertook with said village to supply the water for forty (40) hydrants in said village and for other purposes, for the sum of $30 each per annum; that said contract expired on the 1st day of February, 1896, and was not renewed.

8. That prior to said special election and after the publication of the notice thereof, the plaintiff herein offered to renew the contract with the Village of Skaneateles for hydrant rentals according to the price regulated in the first contract, at $40 per hydrant per annum for five years, and at $30 per hydrant per annum for a term of years thereafter.

9. That without any proceedings to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant, Leslie, as president of the Village of Skaneateles, did, on or about the 21st of March, 1896, appoint the defendants, Hall, Eckett, Root and Shultz, to be water commissioners of the said village, having in contemplation the purpose of constructing for said village a water works seystem of its own.

That the said persons so appointed as water commissioners entered upon the performance of their duties, and have been acting as such. The appointment was confirmed by the trustees of said village, and the said water commissioners having duly qualified, caused a meeting of the electors of the village to be called by the trustees of the village in pursuance of the provisions of Chapter 181 of the Laws of 1875, and a vote was taken at said meeting, the result of which was favorable to municipal ownership, and after said election the said water commissioners issued or caused to be issued bonds of said village to the amount of $30,000, and sold the same for par and accrued interest.

10. That said Board of Water Commissioners of the said Village of Skaneateles entered into a contract for the construction of a water works system for said village, and have expended thereon about the sum of $24,000, and said works are substantially completed.

11. That all of the proceedings were taken without instituting any proceedings to condemn the property of

the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property.

12. That the works of the plaintiff were constructed at a large expense, and its property rights and franchise mortgaged to secure its bonds duly issued, and the income of the plaintiff from the operation of its plant has at various times been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the Village of Skaneateles."

The referee found as conclusions of law as follows:

"1. The Village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a water works system for the use of said village.

2. The consent of the Village of Skaneateles to the organization of the plaintiff as a water works company, and the making of a contract by the Village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within said village or the village from constructing and maintaining a water works system to supply itself with water.

3. Subsequent to February 1st, 1896, no contractual relations existed between the plaintiff and the Village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff: but was entitled to construct and maintain a water works system of its own.

4. The defendants are entitled to judgment herein dismissing the complaint upon the merits with costs, and judgment is ordered accordingly."

To the conclusions of law the plaintiff duly excepted (record 95).

The questions to be reviewed, therefore, are questions of law only upon settled facts; the facts found by the referee.

The following is a specification of the errors relied upon herein namely:

(2.)

"1. The Court erred in holding and deciding that the plaintiff was not entitled to the remedy and relief asked for and sought in its complaint and in affirming the judgment of the Supreme Court of the State of New York, denying to the plaintiff the relief demanded in its complaint and dismissing the plaintiff's complaint.

II. The Court erred in not ordering and adjudging that the judgment of the Supreme Court of the State of New York dismissing the complaint be reversed and that the relief demanded by such complaint be granted, and the defendants restrained by injunction from the performance of the acts complained of.

III. The Court erred in denying to the plaintiff the rights claimed by it under Section 10 of Article I of the Constitution of the United States, and in denying to it any relief on that ground.

IV. The Court erred in not holding and adjudging that the acts of defendants sought to be restrained were contrary to the provisions of Section 10, of Article I, of the Constitution of the United States, securing to the plaintiff the validity and obligation of its contracts made with the defendants under the laws of the State of New York.

V. The Court erred in denying to the plaintiff the rights claimed to be secured to it under Section 1, of the fourteenth amendment to the Constitution of the United States, and in denying to the plaintiff any relief on that ground.

VI. The Court erred in not holding and adjudging that the acts of the defendants sought to be restrained were contrary to the provisions of said fourteenth amendment to the Constitution of the United States, securing to the plaintiff the equal protection of the laws and denying to the State of New York the right to deprive plaintiff of its property under any statute of its Legislature without due process of law.

VII. The Court erred in not holding and that the acts of the defendants sought to be restrained were contrary to the provisions of Article V, of the amendments to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, and that private property shall not be taken for a public use without just compensation.

VIII. The Court erred in deciding in favor of the validity of the statutes of the State of New York and the authority exercised under such statutes by the defendants pursuant to which the acts complained of were performed by the defendants, notwithstanding the fact that their validity was drawn in question, on the ground of their being repugnant to the Constitution of the United States."

In the complaint herein (folio 179, page 85 of record), are the allegations that the acts sought to be enjoined are "in violation of the provisions of Section 10, of Article I, of the Constitution of the United States, and of Section 6, of Article I, of the Constitution of the State of New York," and that such "acts, as against the plaintiff, are in violation of law, inequitable and wholly unauthorized."

The opinion of the Court of Appeals of the State of

New York herein is found at page 101 of the record; the dissenting opinion at page 109. The case is reported in 161 N. Y. Reports, 154.

A reference to the case as reported shows what questions were raised and passed upon by the said Court of Appeals.

The following is a printed copy of a certificate duly filed with the Clerk of this Court, a copy of which was on the 30th day of October, 1901, duly served upon the defendant's attorney herein, namely:

"STATE OF NEW YORK—Court of Appeals.

The Skaneateles Water Works Company, Appellant, vs. The Village of Skaneateles, E. Norman Leslie as President of said Village et al., Respondents.

I, Alton B. Parker, Chief Judge of the Court of Appeals of the tSate of New York, do certify that upon the argument of the appeal in this cause, the appellant submitted, among other propositions set forth in its brief the following:

"I. The village under the delegated authority of the Legislature having granted to the private company its particular franchise, under which it was authorized to enter into contractual relations with the village and the village with it, and under which it engaged on its part to supply the village and its inhabitants with water, the act of the Legislature conferring power thereafter upon the village to render itself the precise service to render which it had agreed with the company, not only that it might render, but should render, (if such power was in fact conferred upon the village) was an act of the Legislature, impairing the obligation of a contract, violative of the Federal Constitution in that respect.

II. The act, Chapter 181, Laws of 1875, insofar as it authorizes a village to construct, maintain and operate a system of water works of its own, after it had granted to a private company a franchise to perform that service for it, such franchise having been accepted by the company, which by virtue thereof has acquired the necessary property to render the service, which service is being actually rendered—is unconstitutional and void in that it authorizes the taking of private property for a public use without compensation.

III. The Act of 1875 (Chap. 181) insofar as it authorizes a village to do what the Village of Skaneateles has done in this case is unconstitutional and void in that it violates that provision of the Constitution which declares that no person shall be deprived of his property without due process of law.

IV. Any express reservation by the Legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished, indirectly would be equally ineffectual and void."

V. The Law of 1875, Chapter 181, insofar as it authorizes what has been done by the Village of Skaneateles in this case, is also violative of Article XIV of the Federal Constitution, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."

That said several propositions were discussed by counsel, were before the Court of Appeals aforesaid, herein, and were passed upon by said Court adversely to the contention of counsel for the appellants in relation thereto.

Dated October 29th, 1901.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York."

Chapter 737, of the laws of 1873 of the State of New York, under which the plaintiff was organized and incorporated, is as follows:

"Section 1. Any number of persons not less than seven may hereafter organize in any town or village of this State a water works company, under the provisions of this act.

Sec. 2. Whenever any persons to the number of seven or more shall organize for the purpose of forming a water works company in any of the towns or villages in this State, they shall present to the town or village authorities an application, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes or other sources and their locations, from which water is to be supplied. Such applications shall be signed by the persons who propose to form said company, and shall contain a request that the said town or village authorities shall consider the application of said company to supply said town or village of this State, or the inhabitants thereof, with pure and wholesome water. Upon the presentation of such application, the authorities of any town or village, which authorities are for the purposes of this act defined to consist for incorporated villages and towns, the board of trustees and supervisor, and for all other owns, the supervisor, justices of the peace, town clerk, and commissioner of highways. Said authorities shall within thirty days of the presentation of said application determine by a vote of a majority of the authorities of said town or village, whether said application shall be granted; and the authorities of any town or village in this State are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the person making such application or either of them. Duplicate certificates of such determination shall be filed in the office of the clerk of said town or village, and in the office of the County Clerk of the County in which said town or village granting such application shall be situated. The persons named in such application shall thereupon meet and organize as a water works company under such corporate name as they may select. They shall file in the office of the Secretary of State a certificate of such organization. Said certificate shall contain the name of the corporation, the names of the members of said corporation and their residences, the amount of capital stock, the location of the office of said company. Such certificate shall be subscribed and sworn to by the president of said corporation, and shall be attested by the secretary thereof. Upon the filing of said certificate, said water works company shall be known and deemed a body corporate, and shall be capable of suing and being sued by the corporate name which they shall have selected, in any of the courts of this State. The capital stock of said company shall be paid in the manner and within the time provided by the "Act to authorize the formation of corporations for manufacturing, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the several amendments thereto, and the stockholders of said companies shall be personally liable for the debts of said companies in the same manner and to the same extent as is provided by said act and the amendments thereto.

Sec. 3. Said corporation shall have power to take and hold real estate for the purpose of their corporation, and may have, hold and occupy any of the waters of this State; provided, however, that nothing herein contained shall be deemed to infringe upon any private right which shall not have been the subject of an agreement and lease or purchase by said corporation. Provided, that said company shall have no power to take or use water from any of the canals of this State or any canal reservoirs as feeders or any streams which have been taken by the State for the purpose of supplying the canals with waters.

Sec. 4. Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted.

Sec. 5. Said corporations are authorized and empowered to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at such rates and cost to consumers as they shall agree upon.

Sec. 6. Any person who shall maliciously or willfully destroy or injure any of the works or property of said company, or who shall maliciously or willfully do any act which shall injuriously affect or tend to affect the water of said company, shall be guilty of a misdemeanor, and may be punished by a fine or imprisonment, or both fine and imprisonment, in the discretion of the court, and shall also forfeit and pay to the company treble damages sustained thereby, to be recovered in any court having cognizance thereof, with costs."

By Chapter 566, Laws of 1890, of said State, it is further provided that every such corporation, "*shall* supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass with pure and wholesome water at reasonable rates and cost," and that contracts may be made therefor.

Chapter 181 of the Laws of 1875, of the State of New York (or so much thereof as is deemed necessary to a decision of this case) under the provisions of which the defendant Village, claims to have derived power to do and perform the acts sought to be enjoined in this action, as the same had been amended at the time of the grant by the Village to the plaintiff, was, as follows:

Section 1. The authorities of any incorporated village in this State may hereafter organize into a Board of Water Commissioners in the manner by this act provided.

Sec. 2. Provides for the constitution of such boards and the filling of vacancies therein.

Sec. 3. Provides for the organization of such board the election of officers, rules and special elections.

"Sec. 4. It shall be the duty of the commissioners to examine and consider all matters relating to supplying the village with pure and wholesome water, and for that purpose they shall have power to employ engineers, surveyors and such other persons as shall be necessary for that purpose; and they shall adopt such plans as in their opinion may be most feasible for procuring such supply of water, and which shall embrace proper distribution pipes and supplies for all streets and places where, in their opinion, it shall be of interest to the village, and shall ascertain the probable amount of money necessary to carry the same into effect; and for that purpose they shall have power to contract for and purchase, and take by deed or other instrument under seal, in the name of said village, all lands, tenements, hereditaments, rights or privileges whatever, and situate at any place within the county in which said village may be situated, which may be required for the purpose, and to contract for the execution of the work, or any part thereof, or the supply of any necessary material; and the commissioners, and their agents and employees, are authorized to enter upon any land or water for the purpose of making surveys, and to agree with the owner of the property, real or personal, which may be required for the purposes of this act, as to the amount of compensation to be paid such owner, subject to a revision by the court upon application by any three taxable inhabitants of the village."

Sec. 5. Provides for the exercise of the power of *eminent domain.*

Sec. 6. Provides the method of procedure for acquisition by condemnation.

Sec. 7. Relates to manner of perfecting title to property acquired.

"Sec. 8. The said commissioners shall have power, and it shall be their duty, to borrow, from time to time, upon the credit of the village, a sum not exceeding ten per cent. of the assessed value of the real and personal estate of the valuation of the village, as shall appear by the then last assessment roll, upon such term of credit not exceeding thirty years, and at rate of interest not exceeding seven per cent. per annum, as shall seem to them for the best interests of said village; and to secure the payment of said loan said commissioners are authorized to make, execute and deliver bonds, certificates or other obligations, which shall be signed by them, or any three of them, as said commissioners; which said bonds, certificates or other obligations shall be made payable in such respective amounts, and at such respective times, as such commissioners shall deem best, and said bonds and the interest thereon shall be a valid liability against said village, and the credit of said village is pledged for the payment of the same; and the said money so borrowed shall be appropriated by said commissioners to supplying said village with water, agreeable with the provisions of this act. But no such bonds, certificates or other obligations shall be disposed of by such commissioners at less than the par value therefor."

Sec. 9. Provides for giving and filing bonds of commissioners.

Sec. 10. Authorizes commissioners to make contracts for constructing water works.

Sec. 11. Provides that commissioners shall not be interested in costracts.

"Sec. 12. The said commissioners, and all acting under their authority, shall have the right to use the ground or soil under any street, highway or roads within the county within which said village is situated, for the purpose of introducing water into and through any and all portions of said village, on condition that they shall cause the surface of such street, highway or road to be relaid and restored to its usual state, and all damages done thereto to be repaired, and such right shall be continuous for the purpose of repairing and relaying water pipes, upon like conditions.'

"Sec. 13. The said commissioners shall establish a scale of rents to be charged and paid to the commissioners from time to time, either in advance or at such time and times, as the commissioners shall prescribe, for the supply of water, to be called 'water rents,' and appropriated to different classes of buildings in said village, in reference to their dimensions, values, exposure to fires, ordinary or extraordinary uses for dwellings, stores, shops, hotels, factories, livery stables, barns and all other buildings, establishments and trades, yards, number of families or occupants, or consumption of water as near as may be practicable, and from time to time, either modify, amend, increase or diminish such rents: and said commissioners and their respective employees shall be authorized at all times to enter into any building or place where water is used from supplying pipes, to examine as to the water, quantity of water used and the manner of using it."

Sec. 14 Provides that owners shall keep in repair connecting pipes.

"Sec. 15 The entire annual receipts for water rents after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works, and of extending the same, and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking fund shall be managed by said commissioners. No investment shall be made in behalf of such sinking fund, except in the bonds of the United States, of the State of New York, or of any city of this State, and in the bonds, certificates or other obligations authorized to be issued by such village under this act, which last named bonds, certificates and obligations, the commissioners may purchase at any time when they shall have funds applicable, at prices not exceeding their par value, and when so purchased said bonds, certificates and obligations shall not be reissued but shall be immediately canceled."

"Sec. 16. In case the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any year, not be sufficient to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be sufficient to pay said principal, and also the said interest falling due that year, it shall be the duty of the board of trustees of said village, and they are hereby directed to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the same time and in the same manner as other expenses of said village are assessed, levied and collected, and the same shall be applied to the payment of such interest or principal, or both."

§ 17. Provides that commissioners shall annually report a statement of their account including a statement of any deficiency in water rents to meet their expenses, &c.

§ 18. Boards of Commissioners may sue and be sued.

§ 19. Provides that Commissioners may establish rules and regulations.

§ 20. Provides that violations of the act shall be a misdemeanor.

§ 21. Provides a method for submitting to the electors and voters of any village the question whether taxes shall be levied for installation by the village of a system of water works.

Sec. 22. Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the Board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or any of them, and if such commissioners shall determine that said works, rights, previleges and properties are necessary for the purposes of this act, they shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisement, who shall be disinterested freeholders and residents of the county. Notice of such determination and application must be served upon the president and secretary of such corporation at least ten days prior to the presentation of any such application. The court shall thereupon appoint the said commissioners of appraisement, whose duty it shall be to examine and appraise the value of the works, rights, privileges and properties required to be taken by the board of water commissioners, and such commissioners of appraisement shall make a report in writing of such examination and appraisement to said court at a special term thereof. Said report shall be verified by the oaths of said commissioners; they shall file a copy thereof with the board of water commissioners, and they shall cause a copy thereof to be served upon the president or secretary of the company, whose rights and properties are the subject of such appraisement, with a notice of the time and place of the presentation of said report for confirmation. Such notice shall be served at least ten days prior to the time when said report shall be presented for confirmation. If objection be made to the confirmation of said report, by said company, or by a water commissioner, or if objection be made thereto by any three tax-payers of said village, the court may order a re-examination of said works and properties, and a re-appraisement thereof; and the court may make an order that testimony be taken concerning the value of said works and properties. Said re-examination and re-appraisement shall be made, and said testimony shall be taken within twenty days from the time when said order shall be made, unless such time shall be extended by the court; and upon the presentation of said second report, the court shall proceed to consider the same, and shall thereupon confirm or reject the same. The compensation of such commissioners shall be three dollars per day for each day actually engaged, together with their actual and necessary expenses as adjusted by the court. The awards made to the corporation whose rights and properties are so taken, shall be paid by the water commissioners herein authorized to be created, from the proceeds of bonds, certificates or other obligations, which are hereby, authorized to be issued by such commissioners for such purpose, and thereupon all the rights, privileges, works, franchises and properties owned by said corporation, or held by it for its purposes, shall be vested in said village."

Sec. 23. Provides how reservoirs shall be constructed.

Sec. 24. The act not extended to any village where a board of water commissioners already exists.

Sec. 25. Provides procedure for extensions.

Sec. 26. Authorizes contracts with towns.

In the year 1896, by Chapter 310 of the Laws of that year, Section 165, above was amended to read as follows:

"Sec. 15. The entire annual receipts for water rents, after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works and of extending the same, and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking fund shall be managed by said commissioners. No investment shall be made in behalf of such sinking fund, except in the bonds of the United States, of the State of

New York, or of any city of this State, and in the bonds, certificates or other obligations authorized to be issued by such village under this act, which last named bonds, certificates and obligations the commissioners may purchase at any time when they shall have funds applicable, at prices not exceeding their par value, and when so purchased said bonds, certificates and obligations shall not be reissued, but shall be immediately canceled. The board of water commissioners of any village is, however, hereby authorized to invest, for the benefit of the said sinking fund, in policies of endowment insurance, in any life insurance company incorporated under the laws of this State, and having assets of over five million of dollars, as shown by the last preceding report of the superintendent of the insurance department, to an amount not exceeding the face value of the bonds, issued by said village for water works and for a term of years ending with the maturity of said bonds. The said commissioners may also, with the approval of the board of trustees in each case, loan said sinking fund on mortgage on improved lands in the same county, owned by the borrower; provided, however, that before they accept a mortgage on lands for any of said moneys they shall be satisfied that the borrower has a title in fee to such lands, and that the same are free and clear of all incumbrances and are worth three times the amount of the sum loaned exclusive of buildings: and they shall require the borrower to satisfy them, by proper evidence, that he possesses an estate in fee in such lands, free and clear of all incumbrances."

In 1890, by Chapter 527 of the Laws of that year, Section 16 was amended to read as follows:

"Sec. 16. In case of the estimated amount of the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any official year ending with the next annual meeting of the village, not be sufficient to pay the interest for that year on said loans, or in case in any such year when any of the principal of the loan secured by said bonds falls due, the amount of said estimated receipts of water rents, after making said estimated deductions, together with the sum in the said sinking fund shall not be sufficient to pay said principal, and also said interest, falling due that year, as estimated by the water commissioners, it shall be the duty of the board of trustees of said village, and they are hereby directed, on notice of such estimate from the commissioners, to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the same time and in the same manner as other expenses of said village are assessed, levied and collected and the same shall be paid to the treasurer of the board of water commissioners to be applied to the payment of such interest or principal, or both. Whenever a deficiency shall be about to exist to pay such maturing interest or principal, or both, upon notice of the same by the board of water commissioners, it shall be the duty of the board of trustees, prior to the maturity of such obligations, to borrow on temporary loan on the credit of the village, at not exceeding the legal rate of interest, such sum as may be required to pay such deficiency, and pay the same to the treasurer of the board of water commissioners, and the same shall be applied to the payment of the interest or principal, or both, on said loans secured by said bonds. The amounts to become due on such temporary loans shall be assessed, levied and collected from the taxable property of said village at the same time and manner as other expenses of said village are assessed, levied and collected. Any surplus at any time in the hands of the board of water commissioners beyond the sinking fund required to pay such interest or principal, or both, and not required by them to pay other obligations of the board, or to extend, repair or carry on the water works or for a reserve for unforseen accidents, shall be paid to the treasurer of the village, for the use of the village, as the same may be appropriated by the board of trustees.

By Chapter 284 of the Laws of 1894, it was enacted as follows:

Sec. 1. Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hunded and seventy-five, and acts amendatory thereof, may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic purposes. A day shall be appointed by the board for hearing grievances against such assessment, and said assessments shall be subject to review as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees. Upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

It clearly and unquestionably appears from an examination of these statutes and the date of their enactment that when, in 1887, the defendant village granted to the plaintiff herein, its franchise or charter and when it extended the same, and when the plaintiff actually constructed its system in 1889, under its said franchise, the said village (having at that time failed to provide itself and inhabitants) was possessed of two complete and adequate methods by which it might supply itself and inhabitants with water, namely, First, the method which, at that time it adopted, through the franchise granted to plaintiff, and Second, by constructing its own works, and rendering for itself the service which it had empowered and obligated the plaintiff to render.

The questions raised in this case were never before passed upon by the Court of Appeals of the State of New

York, while no case precisely similar has been up in any of the courts of said State.

The case of *Warsaw Water Works Co. vs. Village of Warsaw*, 161 N. Y., 176, argued and decided with this case was so like it that the decision and opinion in the former was held by the Court to be applicable to the latter case.

A third case, said to be similar in most of its features, was *Canandaigua Water Works Co. vs. The Village of Canandaigua*, 90 Hun, N. Y. R., 605, in which no opinion was written and in which no facts are stated,—but in which the decision was favorable to the village and against the company.

The judgment rendered in the case was not only unjust to the plaintiff, but is so conceded to have been.

In the State of New York there are possibly a hundred private corporations yet engaged in supplying municipalities with water, and valueing these at an average of $100,000 each, it would make a total investment in such plants of $10,000,000; and what is applicable in this respect to the State of New York is probably applicable to every State in the Union.

The laws of the State of New York conferring upon municipalities the power to acquire existing plants by condemnation under the power of *eminent domain*, (by paying for them their actual market value), such municipalities have conferred upon them a power, adequate in all respects, to enable them to protect themselves from all injury, as from the exactions or the inadequacy of private corporate plants and a power which enables them to perform a public duty themselves, *without inflicting any injury whatever upon the private corporation.* And again, if the municipality does not care to engage in the business, it has protection in its recognized power to grant to a second company a like franchise to render the same public service.

The history of private corporations organized to supply villages with water is, that their organization takes place, usually, long before the inhabitants generally feel the necessity for such a supply. A few, half a dozen, of the more progressive, sooner awakened to the necessity of such a supply, urge upon the others their own views, but without success. They then say to the village authorities, "as the people don't wish to have the village, itself, render the desired service, give us a franchise to do it for and on behalf of the village." And the village voicing the sentiment of the majority, says yes, and confers the power.

But with burdensome restrictions nevertheless. It requires the company, (the law itself requires it), to specify definitely the source from which the supply is to be taken, (Chap. 737, Laws 1873), so that the village in the first instance chooses its own source of supply and can hardly be held to justify complaint if, subsequently, the source turns out to be not what it should be. The law also imposes the condition (Chap. 566, Laws 1890) that the company "*shall* supply" not only the village but the inhabitants thereof" with pure and wholesome water at reasonable rates and cost." So the private corporation subjects itself also to such terms and conditions as the village authorities may impose by the terms of its franchise. In short it undertakes upon its part to fully and completely perform the whole duty of the village in respect to supplying itself and inhabitants with pure and wholesome water, in accordance with the terms and conditions prescribed by the village itself, so that the village plans, directs and controls even in such a case, its water supply.

The franchise containing the conditions, the restrictions and the limitations prescribed by law and inserted by the village authorities therein, being accepted by the private corporation, it is bound thereby; and, thereafter, constructing a plant adequate in all respects, it performs every obligation imposed upon it by the acceptance of the franchise and also performs the public duty which had otherwise been required of the village itself.

The sum which is invested originally in the plant, by no means represents the final investment. The people have to be educated to take and use the water after the private corporation has become ready to supply it. In the process of this education, the company loses money year after year. The first year it gets say fifty patrons, but these being insufficient to pay operating expenses, the company is obliged to raise more money, either upon a new issue of bonds or by advances by its stockholders. During the second year fifty more patrons are added, in the third, year fifty more—and after ten years, the company has expended perhaps twice the original cost of the plant, which, with the original cost, constitutes the *investment*. It is then upon a paying basis.

Now at *this* time just when the plant begins to be profitable, the inhabitants of the village, especially those, who, at the outset were most hostile to the suggestion that the village should engage in the performance of its public duty and who, through hostility to the private corporation, have refused to become its patrons, begin to find fault with the private corporation, to criticise its service and favor the installation of a municipal plant.

"Conceded," they say, "that there is not room for two corporations to render the same service, if we establish a municipal plant there will soon be but one corporation rendering such service and that the municipal corporation,—In the first place our investment will not be much more than one-half that of the private corporation. Then we shall not have to educate the people, for the private corporation has already done that,—the market has been made for and awaits us. If the people refuse to take the water which shall be offered to them by the municipal plant and continue to take water of the private corporation they will soon cease doing so, because nobody will pay for the same thing twice over. That is, they will not pay to keep the private corporation alive by taking its water and at the same time pay taxes to keep the municipal plant in operation."

Putting the matter in a somewhat different light, we have a village here, in the State of New York, owing to itself and its inhabitants "a public duty" which it is authorized to perform itself, or through the agency of a private corporation. In view of this situation it says, voicing a majority of its inhabitants, "if we render this duty ourselves, *at this time,* it will cost large sums beyond the first cost and therefore we won't do it. We will let some private corporation perform the duty for us. We will make it take the water from a good source; will make it agree to supply us with all the water we may require, at rates which we will state in the franchise, or at rates to be fixed hereafter under present or future laws; and then we will stand by and let it invest its money; let it get the people to pipe their houses, put in bath tubs and water closets—and then after a few years, when it has enough patrons to make the business profitable, we will just run alongside their mains, mains of our own, and say to these patrons, cut off from the mains of this private corporation and take from ours, or pay us the equivalent in taxes, whichever you please. It won't cost you anything to make the change, your house is all ready, that don't have to be interfered with, all that needs to be done is out here at the curb, and we will make the change for you without expense."

But when the time comes to say that, the patron of the private corporation protests and says it is not just to the private corporation. But the village replies "that don't make any difference. We have done precisely what the legislature has given us power to do, just what it intended we might do and should do in such a case. When we granted the private corporation its franchise, knowing what our rights were, we did it to lead it on; to induce it to build a plant and educate the people, knowing all the time that as soon as the private corporation should have built up a business, the *law* would enable us to step in and take that *business* without paying a dollar for it. It is for that reason we don't propose to resort to the power of *eminent domain.* The greatest value which the private corporation has, is the *business* which it has built up on the franchise which we granted, and under the law if we build a plant of our own we can get that *business* for absolutely nothing."

"And although we chose the source from which the private corporation was to furnish a supply—and although we fixed the rates to be charged, and bound the corporation to supply us at such rates *for all time*, and although we reserved the right to condemn the plant to be constructed by the private corporation and its rights and privileges; although we have complete protection, and may even grant to another corporation the right to supply us—we will nevertheless convince the courts that what we have done or purpose to do, however questionable in justice and morality, is sanctioned and protected and upheld by law."

While the Court of Appeals of the State of New York unmistakably condemned the morality and "honesty" of this attitude, (record, Fol. 102,) it nevertheless argues that against it, the law is powerless; that the law, in fact, does sanction it.

While in the State of Pennsylvania, the Supreme Court of that State, condemned such attitude in equally strong terms, it was able to and did *vindicate the law* and made it not the upholder of injustice and immorality, but the means of overthrowing both; and it rejoiced when it discovered the principle which enabled it to do so, *although it was obliged to, and did, overrule itself.*

White vs. Meadville, 177 Pa. St., 643.
Metzger vs. Beaver Falls, 178 Pa. St., 1.
Howards Appeal, 162 Pa. St., 374.

From the Court of Appeals of New York which was clearly very much in doubt regarding the correctness of its conclusions, we come, with confidence, to this Court, with the important questions of our case.

POINTS.

I.

THE ACTION OF THE DEFENDANT CORPORATION UNDER THE DELEGATED AUTHORITY OF THE ACT OF 1875, WAS "A LAW OF THE STATE" IMPAIRING THE OBLIGATION OF A CONTRACT AND VIOLATIVE OF THE FEDERAL CONSTITUTION IN THAT RESPECT.

The numerous decisions of this and other courts, in which the constitutional guaranty here invoked, has been under consideration, (not all of them in apparent harmony) and the importance of the present case, has suggested to counsel for the plaintiff, the separate consideration of propositions from "A" to "G" inclusive, as follows:

A.

THE DOCTRINE INVOKED, THAT IN FRANCHISES OF THE CHARACTER GRANTED IN THIS CASE, THERE EXIST, ABSOLUTELY, NO IMPLIED COVENANTS ON THE PART OF THE GRANTOR, IS NOT THE FACT; AND SUCH DOCTRINE IS NOT SUPPORTED BY AUTHORITY.

The celebrated *Charles River Bridge* case, (*Charles River Bridge vs. Warren Bridge*. 11 Peters, 420,) is referred to by our adversaries as supporting the doctrine that in the grant of a franchise to a private corporation to perform a public duty, the grantee takes *absolutely nothing* by implication, but the case does not warrant (and never did warrant), that contention.

The question before the Court was whether in the grant by the Legislature to the Charles River Bridge Company there existed without express words, the implied agreement that the Legislature would not grant a like charter to another corporation to render the same service.

On this question the Court was divided, as the Supreme Court of Massachusetts had before been divided. The question was twice argued. Almost confessedly the decision was hostile to the current of authority. It was at variance with the law as laid down in Kent's Commentaries, Vol. III,458-9,—and was afterwards severely criticised. Judge Comstock in his notes to Kent's Comm. for example, calls the doctrine established "extraordinary" and "latitudinary", and says "it is to be greatly regretted."

It is manifest from a casual reading of the case, that the court had in mind the protection of public interests against the creation of monopolies. It was for the public interest and convenience that in the granting of franchises *there should be no restriction upon competition.* Here was a great highway for public travel, already enormous and rapidly increasing, and to say that the Charles River Bridge Company should constitute the only avenue for it would be to retard the general prosperity, and make the company an arrogant monopoly. In the argument much is said about "competition" and "monopolies." In the dissenting opinion of Judge Story, we find him stating the policy which there controlled the action of the majority of the court, and which led to the final result. At page 606, he says, "it is argued that the present grant is a grant of a monopoly and of exclusive privileges; and *therefore* to be construed by the most narrow mode of interpretation," and so, he says, a Massachusetts statute aimed at monopolies "has been supposed to support the objection." And at page 608 he says, "But it has been argued and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country."

So we have been cited to the cases of the *Syracuse Water Company vs. The City of Syracuse,* 116 N. Y. Rep., 157, *Matter of Brooklyn*, 143 N. Y., 596, (since affirmed in this Court), and *Turnpike Co. vs. State*, 3 Wall., 210, etc., as holding the doctrine that nothing whatever is taken in such grants, by implication.

But neither the Charles River Bridge case, nor any other case, is to be taken as holding such doctrine. It is an universal rule of interpretation applicable to the opinions of courts, that whatever is said in them, is not to be extended beyond its application to the particular case under consideration, and we think, if we turn to the opinion of the Chief Justice in the Charles River Bridge case, the prevailing opinion, we shall find that he did not contend that *nothing whatever* is taken by implication in such grants, but that his contention was (and that was placed upon the ground of public policy) that whatever might be taken by implication, the implication of an *exclusive* grant did not obtain.

At page 549, he says, “The inquiry then, is, does the charter contain *such a contract* on the part of the State?” (A contract that it will not grant similar rights to others to render the like service.) “If a contract *on that subject* can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can *such an agreement* be implied?

Mr. Justice McLean, who wrote for a dismissal of the bill (in the same case),says at page 557,“But it is contended that in governmental grants, nothing is taken “by implication. The broad rule thus laid down cannot “be sustained by authority. If an office be granted by “name, all the immunities of that office are taken by implication. *Whatever is essential to the enjoyment of “the thing granted, must be taken by implication.”*

In the *Sinking Fund cases*, 99 U. S., 700, Justice Bradley said in reference to the franchise then under consideration: “A reservation of power to violate a contract or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or the enacting part of a statute is void.” All this is equivalent to the assertion that the grantor of a franchise agrees that it will do nothing repugnant to its grant.

There is no principle more clearly established by authority than the principle that a franchise is a contract; and that principle does not arise from express words contained in the franchise, *but it is the necessary implication.*

In the Dartmouth College case, the law was established that the grant of a franchise is irrevocable. That is to say, in such a grant is *the implied agreement* on the part of the State that the grantee shall forever enjoy the rights granted, unless there are words of limitation. Chief Justice Marshall in Fletcher vs. Peck, 6 Cranch, 87, 187, is to the like effect.

In *Syracuse Water Co. vs. Syracuse, supra,* the question was practically the same as in the *Charles River Bridge* case; and no more. But Mr. Justice Bradley in this case at page 182, says, "the plaintiff was given corporate existence and *vested with powers and privileges to enable it to exercise its functions.* This incorporeal hereditament was its *property* and whatever other or corporeal property it had acquired having relation to its legitimate *powers* and for the purpose of their *exercise,* became, and while applicable to such purpose was, *inseparably united with the franchise.* The corporate rights and *the corporeal means of their exercise* therefore constitute as it were a single body consisting of property corporeal and incorporeal. *Both the power and the means of exercising it* are essentially united, and upon such union is dependent *the enjoyment* as well as the *practical* value of the franchise.

In the case of *Fletcher vs. Peck*, 6 Cranch, 87-137, the Court said, "*A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.*"

And although this was said in relation to a grant of lands, it is equally applicable to the grant of a franchise, —to the franchise granted in this case.

Thus in *Greenwood vs. Union Freight Co.*, 105 U. S., 13, the Court in speaking of the Dartmouth College case said, "the opinion in that case carried the interpretation of the constitutional provision somewhat in advance of what had been decided in *Fletcher vs. Peck*, 6 Cranch, 87, and the preceding cases, *and held that it applied not only to contracts between individuals and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized,and the right to exercise the functions conferred upon them by statute, were, when accepted by the corporators contracts which the State could not impair.*"

This language moves the annotator of the Am. and Eng. Ency. of Law, to observe (Vol. 15, p. 1035, Note 3). "The Court in this opinion evidently uses the term 'contract' in reference to *a charter* in the same sense that the Court in Fletcher vs. Peck, 6 Cranch, 137, used the same term in reference *to an executed* *contract,* viz: 'A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right.' *This implied contract has its legal obligation;* this construction of an executed contract, *creates a continuing obligation to be protected and brings the obligation within the protection of the contract clause.*" (Of the Federal Constitution.)

So again the Court says in *Fletcher vs. Peck,* supra, "After the performance of a contract, that is after the contract is executed, there remains the implied contract *to which both parties have assented that neither shall retake and that each shall enjoy the right transferred in the execution of the contract.*"

In *People vs. O'Brien,* 111 N. Y., 1-51, the court says: "If it is possible to conceive the idea of a repealable grant, certainly such a grant accompanied with power to convey or pledge the interest granted, must, on the execution of the power *necessarily preclude* a resumption by the grantor of the subject of the grant or any right of property acquired under it."

It is assuredly well settled by authority that all corporations, *in the absence of express restrictions,* have the implied power to do all acts that may be necessary to enable them *to exercise the powers expressly conferred, and to accomplish the objects for which they were created.*

> *Pittsburgh, etc., R. Co. vs. Keokuk, etc., Bridge Co.*, 131 U. S., 385.
>
> *Fort Worth City Co. vs. Smith Bridge Co.*, 151 U. S., 294.
>
> *Jacksonville, etc., R. Co. vs. Hooper*, 160 U. S., 514.
>
> *Am. & Eng. Ency. of Law*, Vol. VII, p. 699 and citations.
>
> *Pearsall vs. Great Northern R'y. Co.*, 161 U. S., 646.
>
> *People ex rel vs. Deehan, etc.*, 153 N. Y. R., 528.

So contracts may be created without express words, i. e., by the *acts of the parties*, and these contracts are as much within the protection of the contract clause of the Federal Constitution as any other contracts.

> *Fisk vs. Jefferson Police Jury*, 116 U. S., 131.

In *Piqua Branch of State Bank vs. Knoop*, 16 How. (U. S.), 369, the Court said: "Every valuable privilege given by the charter and *which conduced to an acceptance of it and an organization under it*, is a contract. * * The rate of discount, the duration of the charter, the specific tax agreed to be paid and *other provisions essentially connected with the franchise and necessary to the business", are secured by contract.*

So it was said upon the authority of numerous cases cited in *City of Walla Walla vs. Walla Walla Water Company*, 172 U. S. 1, that franchises of the character now under consideration are *contracts.*

That is they are not simply licenses to the grantee to lay pipes in the streets, for a contract implies the existence of *mutual* covenants. Consideration answering to consideration. That one party does not obligate itself to render a great service, involving a great expenditure without some answering consideration, express or implied.

And so, in accordance with these contentions, the Court of Appeals in this very case affirms that *"the law* assured to the plaintiff at the time of its incorporation that its business should not be interferred with *otherwise than by competition,"* which is the equivalent of saying at least that in such franchises as this, there are implied covenants.

B.

When the defendant corporation granted to the plaintiff corporation herein the franchise in question and the same was duly accepted, contractual relations were thereby established between the plaintiff corporation and defendant corporation, as distinguished from contractual relations between the plaintiff corporation and the State of New York.

As we have seen that such franchises are *contracts*, they are necessarily contracts between the grantor and the grantee of them; that is to say, as such franchises are granted by the municipality, they are not contracts between the State and the grantee, but between the municipality and the grantee.

We therefore have no case here of *a franchise granted by the legislature of the State*.

No case of a franchise granted by the legislature to one corporation, to render a public service and a like franchise to another corporation to render the same service.

While the Legislature delegates to the municipality in such cases, the performance of its own power, the act performed by the municipality in its grant of a franchise, is, *its own act*. In other words *it makes its own contract*.

This is the necessary and logical conclusion which follows from the existence of the statute which authorizes the *village itself, if agreeable to itself,* to make a "contract *for itself.*"

While it is quite true that *the power* conferred upon the defendant corporation to grant franchises of the kind granted in this case, is a delegated power, such delegated power carries with it, nevertheless, whenever it is exercised, the assumption of obligations and, particularly, the assumption *of contractual relations* with every private corporation on whom it confers the privileges of its franchise. Thus, while in 1887 the corporation defendant was authorized to make the grant which it then made to the plaintiff, the fact that it was *authorized* to make it, made it no less, *its own act.*

And when a municipality makes a contract, or enters into contractual relations with another, it may make itself liable upon implied contracts, or covenants, just as individuals and privite corporations may, if within the scope of their powers, to be deduced by inference from authorized corporate acts, without either vote, deed or writing.

Dillon on Mun. Corp. (4th Ed., §459.)
Am. & Eng. Ency. of Law (1st Ed., Vol. 15, p. 1081.)

So in *Mayor, etc., vs. Second Avenue R. Co.* (32 N. Y., 261, 272), the court says: "Assuming that the Common Council had power to make the grant, then its acceptance by Pearsall and his associates * * invested the latter with the right of property in the franchise which the Common Council could not take away or impair by any subsequent act *of its own.*"

The power of the corporation in the premises is limited, without doubt, to the power conferred; and also to the limitations imposed upon the legislature of the State by the constitution of the State. We therefore concede that as the legislature may not grant any "exclusive privilege," the municipality in this case could not and did not grant to the plaintiff any exclusive privilege whatever. *Let it be understood that this point is conceded at the very start*, so that the grantor, the defendant village, notwithstanding its grant to this plaintiff, possessed the authority, without any sort of question, to grant to any individual, company or other private corporation the same authority, franchise and privilege which it had granted to this plaintiff.

Had it, (the grantor) conferred upon an individual, company or other private corporation the same authority, franchise and privilege which it had granted to the plaintiff, the plaintiff and such individual, company or other corporation, would have been *the competitor* or rival of the plaintiff.

Had the defendant corporation, therefore, granted to such individual, company, or other corporation, the same authority, franchise and privilege which it granted to the

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plaintiff, the language of the Court in *Turnpike Co. vs. State*, 3 Wall., 210, 213, would have been applicable to the plaintiff, had it then complained of such action on the part of the defendant. In the case cited above, it appears that *the State* of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company with authority to construct a railroad between the same cities, the line of which ran near to and parallel with the turnpike. One of the questions in the case was whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company out of its diminished income to maintain the turnpike in proper order. This Court said, "The difficulty of the argument on behalf of the Turnpike Company, and which lies at the foundation of the defense, is that there is no contract in the charter of the Turnpike Company that prohibited the legislature from authorizing the construction of *the rival* railroad. No exclusive privileges had been conferred upon it, either in express terms or by necessary implication; and hence, whatever may have been the general injurious effects and consequences to the company from the construction and operation of *the rival* road, *they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.*"

To the rule thus laid down, therefore, we are, and have been, throughout this case, in entire accord. The contractual relations which existed between the plaintiff and defendant did not embrace such an agreement on the part of the defendant corporation. We never claimed that it did. Our denial of such claim was not sufficient to convince the Appellate Division of the Supreme Court of the State of New York; (see memorandum of decision,record p.98) and in the Court of Appeals of the State of New York, we had some difficulty though we finally succeeded in making it clear that we did not make *that* claim. (Fol. 221 of record).

And if we concede that the fee of the streets in the villages of the State of New York is vested in such villages and that such fee is held in trust for the public uses of all the people of the State so that the legislature, *against the consent of the village*, may authorize the use of such streets for public purposes, it does not affect in any manner the contractual relations, which are created when the village in the exercise of *its* authority confers by *its* act, a franchise upon a private corporation to use the public streets.

C.

THE CONTRACTUAL RELATIONS WHICH EXISTED BETWEEN THE DEFENDANT (GRANTOR) AND THE PLAINTIFF (GRANTEE), EMBRACED MUTUAL OBLIGATIONS AND COVENANTS, NOTWITHSTANDING THERE EXISTED NO AGREEMENT ON THE PART OF THE GRANTOR THAT THE GRANTEE SHOULD POSSESS AN EXCLUSIVE PRIVILEGE.

In Point 1, we have pointed out certain of the implied contracts which arise out of grants of the character under consideration; and while we have shown that it is the settled policy of the government that in such grants there shall not arise the implication of an exclusive grant or that while the grantor reserves in such grants the right to authorize competition, there is always the implied covenant that *the grantor* itself will not otherwise, do any act repugnant to its grant. We therefore contend that when the defendant granted to the plaintiff its franchise in this case, *it* agreed that *it* would do nothing repugnant to its grant, excepting always that it did not agree that it would not grant to some individual company or other private corporation a similar franchise to render to it the like service.

Second. It agreed that the grantee should have and possess the means as well as the power of exercising the rights granted to it without obstruction or hindrance, and especially without *prevention*, on the part of the *grantor.* It therefore agreed that it would not take itself out of the field as a possible consumer or taker—although it did not agree that it would not take of a rival of its said grantee, to-wit: of some other like grantee. In other words the grantor agreed that the grantee should be clothed with every right essential to the enjoyment of its grant.

Third. So we say the grantor agreed that it would not "take back" the thing which *it* granted, excepting by the exercise of the power of *eminent domain."* That the power granted to it and reserved to it, to acquire the very property and rights granted, by the exercise of the power of *eminent domain,* raised the implied agreement, in and of itself, that it would not take back the rights granted, excepting by the exercise of such power.

Fourth. As, at the time of the grant to the plaintiff, the defendant was possessed of two complete and adequate means, by which it was enabled to perform a public duty, (1.) by the method which it adopted, that is, through the instrumentality of the private corporation, (2) by the construction and operation of a system of its own, its grant to the plaintiff waived and "extinguished its own right," and contained the agreement that it would not reassert such right.

Fifth. It agreed that *its* grantee should not be interferred with otherwise than by a competitor.

Sixth. And finally, it agreed that it would not *itself, by affirmative act upon its own part,* destroy the franchise or rights which it granted or the property which should be accumulated under and by virtue of its grant, although we concede, that it did not agree that the value of the property and rights conferred should not be injured or impaired by *competition.*

We contend, among other things, it will be seen, that when the government itself (i. e., a political sub-division of the State) possessing the power of choosing whether it will, itself, engage in the performance of a public duty, or contract with a private corporation, and it makes choice of the private corporation, that it agrees with such private corporation, to waive its own right. This contention is very nearly warranted by the language of the Court in *City of Walla Walla vs. Walla Walla Water Co.*, supra, as follows: "The question "whether the city should supply itself with water, or "contract with a private corporation to do so, presented "itself when the introduction of water was first pro-"posed *and the city made its choice not to establish* "*works of its own.*"

In the Pennsylvania cases (*White vs. Meadville*, 177 Pa. State, and other cases) the Court holds that where the borough is possessed of the two methods of supplying itself with water there is *no* repugnancy, because the legislature did not mean that both methods might be in operation at one time, but that where either method had been adopted the power of the borough should be treated as exhausted. So it says "there will be a *decided* repugnancy in their operation if both methods be put at work at the same time."

But here, in this very case, the Court of Appeals of the State of New York has held (and that holding is conclusive upon this Court) that "the defendant has done precisely what the statute authorizes it to do." The "decided repugnancy" avoided in the Pennsylvania statutes, therefore, is permitted to exist in the statute of the State of New York. But its very existence is evidence, at least, that what the defendant has done was repugnant to its grant and, therefore, violative of its contract.

D.

THE DEFENDANT MUNICIPALITY, AS THE OWNER AND OPERATOR OF A SYSTEM OF WATER WORKS, IS NOT, IN ANY SENSE, THE COMPETITOR, OR RIVAL, OF THE PLAINTIFF.

That is to say—instead of becoming a competitor, or rival,, when it constructed and operated its system, it *superseded* the plaintiff and rendered the service itself, which it had before agreed that the plaintiff should not only render *for* it but *to* it, *for it must not be forgotten* *that the franchise granted in this case was a franchise to supply the village and its inhabitants with pure and wholesome water.*

It no longer required the services of the plaintiff, *nor of any competitor of the plaintiff.* It no longer needed that any one should supply it, it was no longer a bidder in the market for the commodity in question. The *power* of the plaintiff to exercise the right conferred no longer existed, because the defendant as a consumer, as a customer, as a bidder in the market, no longer existed. The village, in other words, by its own act, placed itself beyond the reach of the plaintiff, by placing itself beyond the necessity of being supplied.

And this we insist was an act which actually *prevented* the plaintiff from exercising the rights granted to it. It no longer possessed the *means* or *power* of exercising such rights. The principal right *essential to the enjoyment of the grant*, the right of supplying the village, at least as a competitor, was taken away by the act of the village exercised in pursuance of a statute of the State of New York.

And so as to the inhabitants of the village.

The Court of Appeals of New York held and decided that an act passed by the Legislature of such State in 1894 was unconstitutional and void as impairing the obligation of the contract existing between the *parties* because, under it, those of the inhabitants disposed to patronize the plaintiff, might be induced by a money consideration to become the patrons of the defendant. (Record, folios 226-227).

But the same inducement necessarily grows out of the very relation which exists between the inhabitants and the village. The very nature of the transaction, is such that every inhabitant of the village becomes, in effect, a stockholder in the enterprise inaugurated by the village. Every such inhabitant becomes personally interested in the success of the enterprise. If the revenue is insufficient to meet the operating expenses the deficiency must be made up in some way; and in this case the statute provides for its assessment upon the inhabitants. The inhabitants are, therefore, precisely like stockholders in that they are liable to be assessed to make good an impairment of the capital. So, on the other hand, if the revenue exceeds the expenditure, every inhabitant shares in it, because it results in a reduction of taxation for other purposes, or if not that, in a reduction of the sum which he has to pay for the water which his necessities require.

In *City of Walla Walla vs. Walla Walla Water Company, supra,* it was pointed out in the opinion of the Court that "if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired if not practically destroyed." And the Court further says:

The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit and the citizens would naturally take their water where they could procure it cheapest. The plaintiff upon the other hand must carry on its business at a profit or the investment become a total loss."

(It is to be noted, in passing, that the statute authorizes water commissioners in this case to fix the water rates and provides that taxes shall be levied for deficiencies).

It is insisted, therefore, that when a village enters upon the business of supplying itself and its inhabitants, as in this case, it cannot with truth be said that it is in any sense whatever the *competitor* of the existing private company. On the contrary it has "taken back" the very rights which it granted to the private company. It has "taken back" the very *franchise* which it granted, —and there remains nothing whatever for the private company to do. It has been deprived of its market and hence, of its business.

The village, in such a case, *reasserts* its own right to do the very thing which by grant of power it said the private corporation should do for it,—and leaves the private corporation wholly without *power*. Such is the necessary and inevitable result which follows from the subsequent act of the village.

It is seen from the above quotation from the *Walla-Walla* case, however, that the Court uses the expression "if the city were allowed to erect or maintain *competing* water works." It is from the idea that in such a case the city becomes only a competitor, that such cases as *Charles River Bridge vs. Warren Bridge and Turnpike Co. vs. State* and other kindred cases are cited against us. But they have no application whatever. It is insisted that no such thing as competition was or can exist in a case of this kind. The suggestion that, it can, or does, is against the fact and against reason and common sense. Competitors necessarily stand on equal terms. The Constitution guarantees them the "equal protection of the laws." But here the municipal corporation is the *government* and taxes the private corporation to build as well as maintain its own works, and as the Court concedes in the *Walla Walla* case, possesses power to *compel* its inhabitants to take their supplies from its own mains. That is, if the private corporation is a competitor it possesses the *power* to destroy its competitor. So the referee finds in this case, *as a fact*, that "when the plaintiff shall cease to furnish water to the defendant *its income will be insufficient to meet its outgoing expenses*," and, of course, that means destruction; and it arises because the plaintiff is not *in the nature of things* permitted to compete with the village for the water which the village and its inhabitants require.

By what process of reasoning, the municipal corporation, under such circumstances can be held to be the competitor of the private corporation it is difficult to understand; and yet, so far as we have been able to discover, no case of like character to the one under consideration has ever been decided in this court, or in any other court, in favor of the municipal corporation, unless it has been *assumed* that the municipal corporation was the mere competitor of the private corporation; and, therefore, on the authority of such cases as *Charles River Bridge vs. Warren Bridge* and *Turnpike Company vs. State.*

If the defendant had granted to another corporation precisely what it had granted to this plaintiff, the two corporations would have been competitors. Competitors for what?

First. Competitors on equal terms for the patronage of the requirements of the defendant itself, and *second* competitors on *equal terms* for the requirements of the inhabitants of the defendant. Neither could tax the other, neither could by the exercise of superior *power*, secure the patrons of the other.

What is said in *City of Walla Walla vs. Walla Walla Water Co.* (supra), in view of the twenty-five years' contract in that case, is as applicable to to the case under consideration as it was to that case; and we think that the proposition here contended for should, without further discussion, be conceded. The village does not do what it has done in this case as a competitor, but as a successor of its grantee, as a reasserter of its own right, and, therefore, as a violator of its own contract.

In *Lehigh Water Company vs. Easton*, 102 Pa. St., 515 (affirmed in this Court, 121 U. S., 388), the Supreme Court of Pennsylvania, said with much confidence that the third claim made by the plaintiff "*is wholly without merit;* by constructing a water company of its own, the borough will *not* destroy the franchises of the company; it may impair their value, and probably will do so; but of this the company have no legal cause of complaint."

That this was error on the part of that court is proved by what the same court was finally compelled to say, and did say, in White vs. Meadville, 177 Pa. St., 643. Side by side with the conclusion reached in *Lehigh Water Company vs. Easton*, supra (which resulted in an affirmance by this court) we place the conclusion of the same court on the same subject, in *White vs. Meadville*, supra, as follows:

> "If anything be manifest, it is that if two water mains be laid side by side on the same street equally accessible to the house-holder on each side conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries and expenses one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must by compulsory taxation support the municipal system he will not voluntarily support the private system. *Such a conflict of interests will inevitably bankrupt the system which depends*

on the volutary patronage of the public. "We hesitate to assume, every court is bound to hesitate long before assuming that the legislature intends by grants to distinct corporations for public purposes there shall arise such conflicts in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises that the sovereign does not intend the younger shall infringe upon the elder. But to assume that these franchises can be in existence and operation at the same time, is to assume that the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company, *for in a business view the contemporaneous exercise of the franchise is impossible.* * * * There was no grant of power to put both methods in operation at the same time. For once the power had been exercised, to supply the city by contract through another creature of the same sovereign, then the municipal function has passed from the city and must be performed by the other contracting party which last has rights and obligations imposed upon it by law as clearly defined and capable of enforcement as those of the city."

It took the Supreme Court of Pennsylvania nearly twenty years to discover its own error, but when it did discover it, it was not reluctant to admit it. The conclusion reached, in this respect, by the Supreme Court of Pennsylvania will ultimately be reached by this Court, if it has not already reached it. It is a question which, as the inclination grows stronger toward governmental control of business enterprises, will become more important and more insistant.

The decisions which have obtained, if any, upon the theory that in such cases the municipality becomes only the rival or competitor of the private company, and which have, therefore made the *Charles River Bridge* case and the *Baltimore and Washington Turnpike Company* case, applicable, need to be reconsidered.

The franchise granted in this case having been a franchise to supply *the village and its inhabitants* with water the act of the village in constructing its own system *to supply itself* and its inhabitants was in *effect* a *revocation* of its franchise.

The position of the defendant corporation in relation to the plaintiff is somewhat analogous to the position which the national government would have occupied in relation to the Union Pacific Railroad had it constructed a parallel road of its own, in order to supply itself with the transportation facilities which the Union Pacific Railroad Company had been constructed to supply to it. The anology would be more complete if all the people of all the states had been made sharers in the profit and loss of the government road, and, therefore, with the government, its patrons. Had such an act taken place the Union Pacific Company would have had much more to complain of than the law which created a sinking fund to secure the payment of its obligations to the government, and which was upheld, in this Court, by a somewhat narrow margin.

E.

The acts of 1873 and 1875 were, both, acts which conferred upon the villages of the State of New York legislative powers; the first to grant rights and privileges (of its own) to private corporations and the second to adopt resolutions and ordinances to put in force the provisions of a statute otherwise ineffectual.

It has been urged against the plaintiff, that when, in 1887, it procured from the defendant the right to supply it and its inhabitants with water, the act of 1875 was in existence and, therefore, it is argued the passage of such act could not have impaired the obligations of any contract made between the plaintiff and defendant in 1887.

But we deny that the statute of 1875 was a law of the State of New York, when in 1887 the plaintiff obtained its franchise or when in 1889 it carried out its contract and constructed its system of water works.

It did not become a law of the State as to the parties here until the defendant had by the adoption of resolutions and ordinances accepted it and legislated in pursuance of it.

The first section of the act provides that "the authorities of any incorporated village in this State *may here-*

after organize into a board of water commissioners in the manner by this act provided." Subsequent sections define the acts which may be done when such authorities have so organized and the people by a vote have given them authority to act. Thus,

By Section 21, it is provided as follows: "*At any time after the passage of this act* a meeting of the electors of any village may be called by its board of trustees upon notice published for two weeks in one or more weekly newspapers published in said village, or if no newspaper is publised in such village then in the nearest newspaper published in the County in which such village may be situated, and at which the question will be submitted, whether the taxes in this act authorized for the purposes aforesaid" (constructing a system of water works) "shall be levied and collected from the village as in this act provided; *and no commissioner shall proceed with any duties under this act unless* the majority of voters and of the taxpayers whose names appear upon the last assessment roll of the village voting at such meeting shall vote in favor of such taxes. Said votes shall be by ballot and there shall be written or printed on the ballots of those in favor of taxes, "for the water taxes," and on the ballots of those opposed "against the water taxes," the said board of trustees or any of them shall preside and certify the result of said meeting and the village clerk shall, within five days thereafter, serve each of the commissioners with a certified copy of such certificate."

Here was simply an act of the legislature conferring power upon a village to determine for itself whether it should at some future time construct a system of water works. Its authorities are permitted to decide whether they shall organize as a board of water commissioners; and having so decided and organized, they may proceed to construct a system of water works, if the electors and voters shall vote the necessary taxes. No law existed, however, until the authorities of the village and the electors had voted. It was an act not for the whole State but for particular sub-divisions and such particular sub-divisions were given the right to legislate for themselves upon the subject and to say whether as to them the act of 1875 should be a law or not, and until they should have spoken favorably it was not a "law of the State" at all. On the other hand, when the authorities and the electors should have voted favorably it became a "law of the State."

In *New Orleans Water Works Co. vs. Louisiana Sugar Co.*, 125 U. S., 18-31, the Court says:

> "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power, delegated by the legislature to the corporation, as a political subdivision of the State, having all the force of law within the limits of the municipality that it may be properly considered as a law within the meaning of the article" (contract clause) "of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed, belongs exclusively to the legislative branch of the government and whether exercised by the legislature itself or delegated by it to a

municipal corporation *is strictly a legislative power.* U. S. vs. New Orleans, 98 U. S., 381-392; Merriweather vs. Garrett, 102 U. S., 472."

In *Murray vs. Charleston*, 96 U. S., 432, 440, it appears that the City of Charleston had issued certificates of indebtedness. *By its charter granted in 1783*, power was conferred upon its council to make such assessments on the inhabitants or those holding taxable property within the city, as should, to the council, appear to be expedient, &c. Under this authority repeated in subsequent legislation, ordinances were passed by the council *in 1870 and 1871* assessing such certificates. The Court says:

> "It was not until the ordinances were passed under the supposed authority of the legislative act, that the provisions became *the law of the State*. It was only when the ordinances assessed a tax upon the city debt and required a part of it to be withheld from the creditors that it *became the law of the State* that such withholding could be made. The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when the case was tried; and no judgment could have been given for the defendants without determining that the ordinances were laws of the State not impairing the obligation of the contract made by the city with the plaintiff."

In *Williams vs. Bruffy*, 96 U. S., 176, it was held that any enactment *from whatever source originating, is a statute of the State*, within the meaning of the act regulating the appellate jurisdiction of this court over judgments and decrees of State courts."

So in *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S., 258-266: "A municipal ordinance passed under supposed legislative authority, must be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts."

In *Mayor, etc., vs. Second Avenue R. Company,* (32 N. Y., 261-271,) the Court says:

"The rights of municipal corporations to property in lands and its usual incidents, and to create and establish ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers *held in trust,* as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property, and subject to the operation of such by-laws and ordinances as may be *lawfully passed* for the government and control of the city."

And again in the same case at page 272:

"Assuming that the Common Council had power to make the grant then its acceptance by Pearsall and his associates * * * invested the latter with the right of property in the franchise, *which the Common Council could not take away or impair, by any subsequent act of its own.*"

This case is approved in *People vs. O'Brien,* 111 N. Y., 1.

We, therefore, contend that the act of 1875 did not create or organize a board of water commissioners in the village of Skaneateles and that it did not pretend to do so: that it did not confer any power upon a board of water commissioners to construct a system of water works in such village. What it did do was that it delegated power to the authorities of such village to legislate on that subject and in pursuance of such authority the authorities of such village in the year 1896 organized themselves into a Board of Water Commissioners. Nevertheless, this Board, though organized, was wholly without any power, until the electors and voters of the village had voted to impose a tax of $30,000 upon the people, which we have seen *supra* was a legislative act.

The statute of 1875 became a law of the State, within the meaning of the contract clause of the Federal Constitution in 1896 and not in 1875, and it was not such a law when the defendant made its contract with the plaintiff in 1887 or 1889.

Doubtless the plaintiff knew that the State had delegated this power of legislation upon the village when it constructed its system of water works, but it knew also that at that time the village had not acted upon its delegated power, that it had passed no ordinance or resolution, had organized no board of water commissioners, had voted no tax,—and it had the right to say that any act of the village under the statute of 1875, would be legislation *subsequent to its contract* with the plaintiff, and an act impairing its obligation.

While it is thus clear that "the law of the state," impairing the obligation of the contract in this case, was *subsequent* to the contract, we are not content with the authorities which hold that it must be a law subsequent to the making of the contract, which impares the obligation of a contract.

In *People vs. O'Brien*, 111 N. Y. 1, the Court says: "An express *reservation* by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void."

So in the *Sinking Fund cases*, 99 U. S., 700, Mr. Justice Bradley says: "The reserved power in question is simply that of legislation to alter, amend or repeal a charter. This is very different from the power to violate or to alter the terms of a *contract* at will. A *reservation* of power to violate a contract, or alter it, or impair its obligation would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate the reserved power is sustainable on sound principles *but in-*

terpreted as the reservation of the right to violate an executed contract it is not sustainable."

F.

THE ACT OF THE DEFENDANT IN CONSTRUCTING AND OPERATING ITS OWN SYSTEM OF WATER WORKS, UNDER THE CIRCUMSTANCES OF THIS CASE, FINDS NO SUPPORT OR JUSTIFICATION, LEGAL OR OTHERWISE, IN THE RESERVED POWER OF THE LEGISLATURE OF NEW YORK TO "ALTER FROM TIME TO TIME OR REPEAL," GENERAL LAWS PROVIDING FOR THE FORMATION OF CORPORATIONS.

The constitutions of the states relating to corporations differ materially. Thus, while it is, or was, provided in the constitution of Ohio (1851) that, "no special privilege or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly". *no such reservation exists in the constitution of New York.*

It is provided in the constitution of New York, only, so far as this case is affected that, corporations may be formed under general laws "and that" all *general laws* may be altered from time to time or repealed."

It is apparent that the reservation of power to alter, repeal or revoke *any* special privilege granted (Ohio constitution) is not the same thing as power reserved to alter or repeal a general law providing for the formation of corporations. The power to revoke *any* special privilege, refers to every separate, single individual privilege. That is to say *any* one, special privilege, may be singled out from a general class and revoked,—while the power to alter or repeal a *general* law, is a power which, when exercised, will affect every corporation organized under it, alike.

So, while under the constitution of Ohio, delegated power to grant special privileges may be conferred upon municipalities under a general statute, under the same constitution power may be delegated (implied from the delegated power to *grant* the special privilege) to revoke its grant. If that be the case under the constitution of Ohio, however, no such power of revocation could be conferred upon a municipality of the State of New York, because it is a power which the legislature of New York, itself, does not possess.

If it be conceded that the repeal of a *general* law under which a franchise has been granted is, in effect, the same thing as the revocation of a franchise (which however, we do not concede) the power to revoke *any* special privilege, and the power to repeal a general law, are two very different things to be taken account of when it is proposed to organize a corporation.

What a modicum of danger exists in the power to repeal a *general* law under which hundreds of corporations have been organized and under which millions of dollars of capital is being profitably employed. On the other hand how great the danger in the reservation of power to revoke *any* special privilege.

If the plaintiff accepted its franchise subject to the right of the legislature to amend or repeal the general law which authorized it, it was accepted subject to such alteration or repeal *only*, and we are not complaining because the legislature has altered or repealed such law. The law, in fact, though it may have been amended, has not been repealed, and, therefore, if repeal is equivalent to revocation, there has been no revocation.

Until the general law of 1873 has been repealed (by the legislature) we will not be called upon to ascertain the rights of this and a hundred like corporations formed under its provisions.

In Miller vs. N. Y. & E. R. Co., 21 Barb. (N. Y.), 513, which has been cited with approval in this Court, it was contended that the power to repeal, conferred unlimited power to amend, but Mr. Justice Strong in relation thereto aptly said "It is not material to inquire "whether the legislature has a right to repeal the defendant's charter unless it has been forfeited by the "misconduct or neglect of its managers. *It has not "been repealed and until it shall be the company is, and "will be protected by the constitution in its rights of "property.*"

But when it comes to repealing a *general* law as a means of revoking the franchises of corporations organized under it, assuming the existence of such a power, it would be in practice a nullity. A power, the exercise of which, has never been attempted in New York, and never will be, until the rights of property are wholly repudiated.

Further than this, however, where the power to repeal (or revoke, if to repeal is to revoke) exists, it is a power which has its limitations. It cannot be resorted to, to enable the grantor to repudiate its contract. It cannot be resorted to, to enable the grantor to take back for its *own uses and purposes* the rights and privileges which it granted. It cannot be resorted to, where its operation will destroy directly, or indirectly, property and rights lawfully acquired.

As regards even this reserved power of the legislature to alter or amend the power is a limited one. In *Shields vs. Ohio*, 95 U. S., 319, Mr. Justice Swayne writing the opinion of the Court, says (p. 324): "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers the vested rights of property of corporations, in such cases are surrounded by the same enactions and are as inviolable in other cases."

Again in Miller vs. State, 15 Wall., 478, 498, the Court says: "This reserved power to legislate is not without limit and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter and which, by a legitimate use of the powers granted have become vested in the corporation."

In the *Safety Fund cases*, 99 U. S., 700, Chief Justice Waite says: "Congress not only retains but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. *That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made.*"

But in New York, whatever may be the law in Ohio or Massachusetts, there exists no reserved power to *revoke* a franchise conferred upon a private corporation. The power to alter and repeal general laws providing for the oganization of corporations, may, and quite likely does, constitute a reservation of power to destroy or take the life of the corporation itself, but that is not a reservation of power to revoke a franchise. The franchise is property which survives the corporation. That is, the death of a private corporation has no other effect upon its property than the death of a natural person upon his (*Mumma vs. Potomac Co.,* 8 Pet., 281, 285.)

The nature and character of such franchises is an important inquiry in the consideration of this case. In the "Canandaigua case" so called, which, no doubt, will be called to the attention of this Court (we have been unable to lay our hands upon the report of the case), Judge Coxe is alleged to have said, in speaking of a like franchise: "It was a license and nothing more." If it was no more than that, it was probably revocable, but it was more than that, it was a franchise, it was a contract.

In *People vs. O'Brien, et al.* (111 N. Y. Rep., 40-41) the Court (in an opinion, which for point, ability, breadth and clearness, deserves to rank with the greatest of judicial utterances) said, "When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment and the extent of litigation conducted in the various courts, State and Federal, in which they have been upheld and enforced, there is no question, but that in view of legislatures, courts and the public at large certain corporate franchises have been uniformly regarded as *indistructable by legislative authority* and as constituting property in the highest sense of the term. It is, however, earnestly contended by the State, *that such a franchise is a mere license or privilege enjoyable during the life of the grantee only and revocable at the will of the State.* We believe this proposition to be *not only repugnant to justice and reason, but contrary to the uniform course of authority in this country.* The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the right of eminent domain, and invested them with the attributes of property generally."

The franchise under consideration is included in the franchises above referred to for the court in the same case says, page 47, "we must be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz. those requiring for their enjoyment the use of corporal property, such as railroad, canal, telegraph, gas, *water*, bridge and similar companies."

The case cited above (*People vs. O'Brien*, 111 N. Y., 1), was that of a street railroad corporation, which had obtained from the municipality of the city of New York the franchise or privilege of operating a railroad on one of the streets of that city. The corporation was subsequently dissolved by an act of the legislature. The legislature created various statutes under which a certain action was brought and the Court says (page 36), "the statutes upon which the action is predicated confessedly assumes the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons and bestow their value upon the donee of the State. *The statutes contemplate the absolute distruction of the property of the corporation and the loss of its value to the creditors* who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted *to accomplish the purposes of the legislation.* It is therefore contended by the Attorney-General that none of the franchises of the corporation survived its dissolution and that the mortgages previously given thereon as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced."

"If it could be supposed for a moment, that this claim was reasonably supported by authority or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities."

"The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of the rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even the framers of our constitution in respect to the effect of the power of repeal, reserved in acts of a corporation, upon property rights of corporations, such power must still be exercised *in subjection to the provisions of the Federal Constitution.*"

We quote at length from this opinion because the attempt made in that case, as stated in the quotation, corresponds with the defense made in the case under consideration. The defendant asserts its right "to wrest from the plaintiff its franchise" under legislative sanction: to take it, itself, "as the donee of the State." The statute under which it proceeds "contemplates the absolute destruction of the property of the corporation, and the loss of its value to the creditors, who have made loans in good faith upon the security of such property," and the defense seeks to accomplish the purposes authorized by the legislature. It is therefore contended by counsel for the defense that the thing granted being a mere license, revocable at the pleasure of the grantor and that the construction of a plant of its own, being no more than a revocation, neither the plaintiff nor its creditors have cause of complaint.

But it seems that under the Constitution and laws of New York the franchise granted to the plaintiff is irrevocable. The Court of Appeals of the State of New York so holds not only in *People vs. O'Brien, (supra)*, but in numerous other cases. The argument against the contention that such franchises are irrevocable, either directly, or by the repeal of the act of incorporation, proceeds *first* upon the existence of the fact that such franchises are *property* and *second* upon a denial of the existence of legislative power to *destroy* property; and the able argument is not only supported in reason and logic but by the authority of the Courts both Federal and State.

"If it is possible," says the Court, (page 51), "to conceive the idea of a repealable grant certainly such a grant, accompanied with power to convey or pledge the interests granted, must on the execution of the power, *necessarily preclude a resumption by the grantor of the subject of the grant or any right of property acquired under it.* An express reservation by the legislature of

> power to take away or destroy property lawfully acquired or *created* would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

Greenwood vs. Freight Co., 105 U. S., 13, has been referred to as not being in harmony with the contention that a repeal of a charter of a corporation does not carry with it the destruction of a franchise granted to the corporation, but Mr. Justice Miller says in that case:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the Courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such corporations to their interests in its property are not annihilated by such a repeal and there must remain in the courts the power to protect these rights."

It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the provisions requiring compensation to be made therefor under the power of eminent domain.

But this subject need not be further pursued because there has been no repeal of the plaintiff's charter and no power is reserved to revoke a franchise unless by a repeal of the charter under which it is held. We think also that it must be held, in view of the decisions of the Court of last resort in New York, that no power is reserved by the Constitution or laws of New York to revoke any franchise or special privilege, that no power existed to revoke the franchise in question.

G.

The Court of Appeals of New York has held that Chapter 284 of the Laws of 1894 (ante page 22) contravenes Sec. 10 Art. 1 of the Federal Constitution and is void, (record, folio 227,) but that the remainder of the statute, excepting a part hereinafter referred to, is not open to that objection.

We think we have shown herein that the argument which applies to Chapter 284 of the Laws of 1894 applies with equal force to the entire statute; and we think that the action of the village in doing what it has done in the premises, merits the condemnation of the Court, *only* upon the suggestion that its act was unauthorized.

The conclusion of the Court of Appeals regarding Chapter 284 of the Laws of 1894 is based upon the very evident fact that it provides a method by which the plaintiff may be deprived of its customers. Thus the Court says (fol. 227):

"An attempt to exercise the authority sought to be conferred by this provision of the statute would necessarily deprive a private corporation of all its customers, and, as a result the business of such corporation would be absolutely destroyed, a business which the law assured it at the time of its incorporation should not be interfered with otherwise than by competition."

But in the *Walla Walla* case, frequently cited herein, this Court says:

"If the city were allowed to erect and maintain competing water works, the value of those of the plaintiff would be materially impaired if not *practically destroyed.* The city might fix such price as it chose for its water and might even furnish it free of charge to its citizens and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit and the citizens would naturally take their water where they could procure it cheapest. The plaintiff on the other hand must carry on its business at a profit or its investment becomes a total loss."

It is thus seen that this court supplies the same reason for invalidating the whole law, or at least a greater part of it, which the Court of Appeals supplied for invalidating Chapter 284 of the Laws of 1894.

And it seems clear, that if the law of 1894 was void as "impairing the obligation of contracts," the whole statute must be void also for precisely the same reason, for, as the Court of Appeals says, "the law assured the plaintiff at the time of its incorporation that its business should not be interfered with otherwise than by competition."

> "To hold that one of the powers the legislature has placed in the hands of the village, by which the plaintiff has been partially destroyed, is unconstitutional, avails nothing, when others, equally potent, are allowed to stand, to the utter destruction of the old company."
>
> Dissenting opinion, fol. 233.

The Court of Appeals saves the act of the village, by eliminating the act of 1894, and, if we understand it, by eliminating the power sought to be conferred, of taxing the plaintiffs' property for the construction and maintenance of defendant's water works, (fol. 228) but it does not allude to the power which exists to tax the inhabitants of the village for deficiencies which this Court in the *Walla Walla* case shows, is equally if not more destructive of the property of the plaintiff.

Neither is the reason assigned by the learned Chief Judge of the Court of Appeals for eliminating the evil in the statute, to the intent that the remainder may be saved, a good one. It is not the fact that many municipalities have constructed independent water works under this statute where private companies have been employed to render the public service, but on the contrary there are many private companies now engaged in supplying municipalities, whose properties are to be destroyed, if such acts are to be upheld by the courts. Destroyed *wantonly*, because the municipalities taking them *at their worth*, can never be losers.

It is difficult to see precisely what the Court of Appeals means when it says (fol. 228) "Neither is it an essential part of the scheme that the plaintiff's property should be taxed to pay for the construction and maintenance of the defendants' water works. Abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff for such purposes."

Assuming this to be so, it is a matter of minor importance to the power which confers upon the Board of Water Commissioners authority to establish rates and the power to assess the inhabitants generally, including the plaintiff, to make up all the deficiencies. But how is the plaintiff's property to be exempted from taxation to construct and maintain the defendants' system, *under the act of 1875?* Under that act, before anything can be done, the voters and electors (plaintiff excluded) must meet and vote in favor of the necessary taxes. Having done this such taxes as are necessary must be assessed on all the real and personal property in the village including the property of the plaintiff.

But if the Court of Appeals means that taxation may be avoided, by an issue of municipal bonds and the collection of an adequate revenue for their payment, it loses sight of the fact that such adequate revenue must be obtained at the expense of the private corporation, and in the process of its final destruction, *under the* *standing threat of taxation for deficiencies in the event of an inadequate revenue.* Hence while it may be true (though we do not see how it is possible that it can be) that, "abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff," *the principal resource is the ever standing threat of taxation for deficiencies, a much more "ingenious and effective device to deprive the plaintiff of its customers" than Chapter 284 of the Laws of 1894 and a device, too, which is necessary, if not inherent in the power to construct, maintain and operate a system of municipal water works.*

II.

THE ACT OF THE DEFENDANT CORPORATION UNDER CHAPTER 181 OF THE LAWS OF 1875, VIOLATED SEC. 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT WAS AN ACT OF THE STATE DEPRIVING PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The act complained of, although the act of the village, was also the act of the State, in that it was the act of a political sub-division of the State, under the delegated authority of its Legislature. The restriction is on *every branch* of government. The prohibitions "refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities; and, therefore, whoever by virtue of a public position under State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of and for the State *and is clothed with the State's power, his act is that of the State.* This must be so, or, as we have often said, the constitutional prohibition has no meaning."

Chicago Etc. R. Co. vs. Chicago, 166 U. S., 226.

The act we are complaining of here is the act of the defendant corporation under the State's delegated power.

Corporations are protected equally with natural persons.

Smyth vs. Ames, 169 U. S., 466.
Covington Etc. Turnpike Road vs. Sandford, 164 U. S., 578.

The *property* of the plaintiff, when, in 1896, under delegated authority, the defendant village organized a board of water commissioners, consisted *first*, of its *franchise*.

Gulf and Ship Island R. Co. vs. Hewes, 22 Sup. Court Reporter, 26, 30.

Such franchise was not the exclusive privilege of supplying the *village* and its *inhabitants* with water, but it was the privilege of supplying the village and its inhabitants *on equal terms with all other corporations and individuals.* This right or privilege of *equality* in the service to be rendered was an "essential attribute" of the plaintiff's property and to deprive one of an essential attribute of his property without due process of law is as much within the constitutional inhibition as depriving him of the property itself.

So in *Matter of Jacobs*, 98 N. Y., 98, Judge Earl says, that this constitutional guaranty "may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated: it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it, or *its value*, or any of its *essential attributes* deprives the owner of his property."

In *Pumpelly vs. Green Bay Co.*, 18 Wall., 166, 167, Judge Miller says: "There may be such serious interruption to the common and necessary *use of property* as will be equivalent to a taking within the meaning of the Constitution."

In *Wynehamer vs. People*, 13 N. Y., 378-398, Judge Comstock says: "When the law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power."

In *People vs. Otis*, 90 N. Y., 48-52, Judge Andrews says: "Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

See also

State vs. Julow, 129 Mo., 163.
Janesville vs. Carpenter, 77 Wis., 288.

If it be true then, as above stated, that the plaintiff's franchise was the privilege of supplying the village and its inhabitants *on equal terms with all other corporations and individuals*, it is insisted that it has been absolutely and completely deprived of this attribute of its property by the act of the defendant.

Doubtless this brings us back again to the question, is the defendant corporation in operating a system of water works the *mere competitor* of the plaintiff? For if it is not, but the destroyer of the plaintiff, then the plaintiff is deprived of this attribute of its property, without due process of law.

An attribute of the franchise was the privilege of supplying the village.

The question turns in part upon a consideration of the question whether the laws operate on the plaintiff and defendant *alike*.

Duncan vs. Missouri, 152 U. S., 377.
Giozza vs. Tiernan, 148 U. S., 657.
Leeper vs. Texas, 139 U. S., 462.
Hurtado vs. California, 110 U. S., 516, 535.

And whether the plaintiff is exempted from the exercise of the unequal or arbitrary power of the government, (See cases last above cited and)

Dent vs. West Virginia, 129 U. S., 114-124.
Caldwell vs. Texas, 137 U. S., 692, &c.

Judge Story (Story's Const., §1935) defines the guaranty of due process of law as securing "the right to be protected in life and liberty and in the acquisition of property under equal and impartial laws which govern the whole community."

It is therefore insisted that such cases as *Charles River Bridge vs. Warren Bridge*, *Turnpike Company vs. State*, *Syracuse Water Company vs. City of Syracuse*, and *the Central City Water Company*, &c., have no application whatever to this case. Neither the Warren Bridge Company, nor the Central City Water Company, nor the Railroad Company sought to be restrained in *Turnpike Company vs. State*, possessed the power, (possessed by defendant in this case) to take the property of the other corporation, both by the power of eminent domain and taxation. Neither of such companies sought to be restrained, possessed the power to levy taxes upon the customers of the other corporation to make good deficiencies in revenue, due to inadequate rates of charges for services rendered.

What, we ask, would have been thought of legislation in the *Charles River Bridge* case, if instead of simply granting to the Warren Bridge Company a franchise to construct another bridge, it had given the Warren Bridge Company power to tax the Charles River Bridge Company to construct and maintain its own bridge? Of a law which provided that out of the tolls of the Charles River Bridge Company a percentage, to be fixed by the Warren Bridge Company, should be paid annually to the Warren Bridge Company? What would be said of legislation conferring upon the Warren Bridge Company power to tax the people of the whole State of Massachusetts to support its bridge, to enable it to maintain its competition with the Charles River Bridge Company? Not only to enable it to *maintain its competition*, but to *destroy* its adversary?

So in the case of the Syracuse Water Company vs. The City of Syracuse, the questions suggested are, what if the legislature, or the City of Syracuse under authority of the legislature, had granted to the Central City Water Company, power to tax the Syracuse Water Company to construct its own plant and thereafter to tax it annually for its support and maintenance? What if the legislature, or the city, had given to the Central City Water Company, power to tax the people of the whole city to enable it to maintain competition with the old company, and so ultimately to destroy it absolutely and completely?

The provision of the Federal Constitution herein appealed to, says Earl, Judge, in *Stuart vs. Palmer*, 74 N. Y., 183, "is founded on natural justice." When the provision was new to the Constitution, Chief Justice Waite, in *Munn vs. Illinois*, 94 U. S., 113, said it was "old as a principle of civilized government." In *Burton vs. Platter*, 10 U. S. App., 657, the Court says: "Every disregard of this principle by Courts, legislatures or citizens tends directly toward distrust, insecurity, disorder and anarchy." So, as we have seen, it is intended to secure the individual from the arbitrary exercise of the power of government and to protect property from confiscation, destruction and impairment.

So, in view of what this Court says in the *Walla Walla* case that "if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired if not practically destroyed," and of what the highest court in Pennsylvania says to the effect that when the Borough and the private corporation seek to render the same service, the plant of the private corporation must be abandoned, and of what the Court of Appeals in this case says that the act of the village was "an unconscionable performance" repugnant to common fairness if not common honesty, may we not maintain, as we do, that the act of the village was an arbitrary exercise of power and violative of the clause of the Federal Constitution invoked herein?

In *Davidson vs. New Orleans*, 96 U. S., 97, Mr. Justice Bradley said: "I think, therefore, we are entitled under the Fourteenth Amendment not only to see that there is some process of law, but 'due process of law' provided by the State law where a citizen is deprived of his property; and that in judging what is due process of law respect must be had to the cause and object of the taking,—whether under the *taxing* power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' *but if found to be arbitrary. oppressive and unjust it may be declared to be not due process of law.*' "

"Due process of law" does not mean merely an act of the legislature. As the court in Dorman vs. State, 34 Ala., 216, well said: "if life, liberty and property could be taken away by the direct operation of a statute the enjoyment of these rights would depend upon the will and caprice of the legislature and the provision would be a mere nullity. Thus construed the constitution would read, 'no person shall be deprived of his life, liberty or property unless the 'legislature pass a law to do so.' "

In efforts to discover the weaknesses, if any, which exist in our arguments, we have asked ourselves searching questions, some of which, may, perhaps, occur to this Court. For instance, conceding for the sake of the argument that, after the plaintiff had constructed its plant, the defendant, and every inhabitant of the defendant, had the right to decline the services which plaintiff was prepared to perform and that the defendant and most of its inhabitants now decline such services,—the question is asked if the plaintiff, notwithstanding, does not still possess the same privilege which was granted to it, i. e., the privilege of supplying both the village and the inhabitants, if it can get them to do business with it?

This question cannot be answered in the affirmative. It cannot be said that when the village had made itself wholly independent of the plaintiff's services that plaintiff's privilege remained: that when, by its own act, for the very purpose that it might not be compelled to take its supplies from the plaintiff, it constructed its own plant, it cannot be said that plaintiff still retained its privilege. The plaintiff's privilege was to supply a municipality *in need of a supply* from some source. The privilege of supplying a *possible* consumer, a possible *taker* of the plaintiff, or of *some rival*. When it constructed its own plant, it asked no one to supply it, it ceased to be a possible consumer, it was no longer a possible taker of the plaintiff or of any rival of the plaintiff.

The only way we can get this village to do business with us is to place it back where it was before it constructed its own plant. That is it must again be placed *in need of a supply* and made a *possible consumer.* The privilege of supplying a village in need of no supply is a nullity, a privilege impossible of execution.

So, as to the inhabitants, we no longer have the privilege of supplying them. The privilege of supplying them, to be such, must be one *on equal terms* with any and every other individual or corporation. *To say we have the privilege of supplying the inhabitants provided we supply them for one-half the rates which the village will supply them for, is not a privilege.* Reserving the right to fix the rates for water, with power to tax the inhabitants for deficiencies, to say nothing of other provisions, alone, deprives the plaintiff of supplying the inhabitants. So if there was no such reservation, the interest which every inhabitant has in the success of a municipal system,—the *pecuniary* interest,—deprives the plaintiff of the privilege of supplying the inhabitants. Such is the natural and necessary result of the act of the plaintiff.

But it is further asked, "Suppose the village water works should break down and it (the village) should come to the plaintiff again, will it not have all the power to supply, that it had before?"

That may be, but assuming it to be the fact, it does not show that the plaintiff has the *existing* privilege or power. It must wait until it does break down,—which in and of itself shows that while the village plant *exists,* the plaintiff's privilege and power is gone, does *not* exist.

It is simply the same thing as saying, that if the defendant had never constructed its system, then the plaintiff would have the power and privilege of supplying it. So it is the same thing as saying, that if the plaintiff succeeds in this action and obtains its injunction, it will then have again what it was granted, the privilege and power of supplying the defendant and its inhabitants, but which, the village, by its act, has taken away.

The act of the village is an act of the State, therefore, depriving the plaintiff of its property; of its franchise; of its attributes; of its privileges; of its customers and it does this without process of law.

III.

IF PLAINTIFF AND DEFENDANT ARE, ALIKE, BUSINESS CORPORATIONS AND COMPETITORS FOR THE SAME BUSINESS, (WHICH WE DO NOT CONCEDE) THE ACT OF DEFENDANT VILLAGE CANNOT BE SUSTAINED FOR THE REASON THAT IT CONTRAVENES SEC. 1 OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND "DENIES" TO THE PLAINTIFF "THE EQUAL PROTECTION OF THE LAWS."

The only cases to be found, (including this case in the Court of Appeals,) which seem to uphold a municipality under the circumstances of this case, are those in which it is asserted that the municipality is nothing in the world but the competitor, on equal terms, of the private company.

Denying that they are such competitors, we are now contending, that, if they are, they are not equally protected by the laws; that the act of 1875 (Chapter 181,) with its amendments, discriminates against the plaintiff as the mere competitor of the defendant.

"Yes," the Court of Appeals says, that is the fact as to Chapter 284 of the Laws of 1894, because "it is a device" than which "it would be difficult to conceive one more ingenious and effective to deprive plaintiff of its customers."

So it *seems* to say the same of the power of defendant to tax the plaintiff's property for the construction and maintenance of its own plant. (Fol. 228). Although it says it in such an indecisive way that the plaintiff has not ventured to rely upon it, but has paid the taxes which the defendant has assessed against it, since the decision was rendered.

But of the power of the village authorities to establish rates and to tax the inhabitants for deficiencies, which is a device even more potent for the same purpose, than the one so strongly condemned, it says nothing.

It is to be observed, (and this observation relates to each of the preceding points) that Section 16 of the Act of 1875, was materially enlarged by Chapter 527 of the Laws of 1890, passed *after* the plaintiff had constructed its works. (Ante page 21-22).

The provision appealed to relates as well to corporations as to natural persons.

Minneapolis etc. R. Co. vs. Beckwith, 129 U. S., 26.

Home Ins. Co. vs. New York, 134 U. S., 594, etc., etc.

So the citation in our next preceding point from *Chicago etc. R. Co. vs. Chicago*, 166 U. S., 226, applies as well to the provision of the Constitution now invoked as to the provision then under consideration.

And it is a denial of the equal protection of the *laws to discriminate in legislation between different corporations and natural persons engaged in the same business.*

Louisville, etc., R. Co. vs. Railroad Com'rs., 19 Fed. Rep., 679.

San Mateo County vs. Southern Pac. R. R. Co., 13 Fed. Rep., 733.

If the Court shall hold that the plaintiff and defendant corporations are simply and only competitors it must find that they are placed upon an equal footing so that the ability of neither to compete is abridged or infringed upon by the other.

We submit that such an equality cannot be found because it does not exist. On the contrary we find as follows:

1. The defendant possesses the power of eminent domain and may take the property of the plaintiff at any time. The plaintiff possesses no such power.

2. The defendant both in the construction and maintenance of its plant is given power and authority to tax the property of the plaintiff, but the plaintiff to construct or maintain its own plant has no power to tax the property of the defendant.

3. The defendant is given power to compel the plaintiff to furnish to it and to its inhabitants pure and wholesome water "at reasonable rates and cost." In other words it has power to fix the rates of charges of the plaintiff, but the plaintiff has no such power over the defendant.

4. The defendant has power to fix its own rates of charges to the inhabitants of the village, who are, excepting the village itself, its only possible customers, and if such charges are insufficient to maintain its plant it has power to compel such inhabitants to make up all deficiencies. The plaintiff is given no such power.

5. It has power to become and does become the patron of its own plant, and for such sum as it agrees to pay, it possesses the power to compel the plaintiff to pay its portion, as one of the taxpayers of the village.

Finally the defendant possesses the power which, as this Court in the *Walla Walla* case says, enables it to "materially impair" if not to "practically destroy" its competitor. Of course the plaintiff has no such power. Again it possesses a power which according to the Supreme Court of Pennsylvania in *White vs. Meadville*, enables it to compel the plaintiff to abandon its property. The plaintiff possesses no such power. Again it possesses a power which, when it undertakes to exert it, the Court of Appeals of New York, must needs pronounce it "an unconscionable performance." The plaintiff is not given *that* power.

Does the State of New York then, place these two *persons*, as competitors, on an equality?

The Court of Appeals eliminates the act of 1894, possibly the power of defendant to tax the plaintiff, and so undertakes to *make equality*. So this Court may say the power of the defendant to fix rates and levy taxes for deficiencies, may be eliminated, with further intent to save the act of the village from judicial condemnation.

But it cannot do that, because the power to construct, maintain and operate water works as a business, conferred upon a village, carries with it, of necessity, without express authority, the same powers. That is, the village, if authorized as a business corporation, to construct and maintain water works, is given power "to do all acts that may be necessary to enable it to exercise the powers expressly conferred and to accomplish the objects intended to be accomplished." (See Ante Point I, and authorities).

That is to say, as it takes money to build, an authority conferred to build, implies authority to raise the necessary money by taxation; and so as to maintenance and operation, if revenues shall prove insufficient, authority to carry on the business also confers authority to fix rates for service and to collect the same.

So that from and out of the mere grant of the right to a village corporation, to construct and maintain and operate a system of water works, arises the exclusive character of its power. Such power cannot be gotten rid of by eliminating portions of a statute expressly conferring it, for it will still remain after the courts shall have done their best or their worst.

So again if this is to be a process of elimination to make the two corporations equal to save the defendants' act, it cannot end with the act of 1875 and must go back to the act of 1873 which subjects the private corporation to the control of the municipal corporation.

The Court of Appeals says "abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff for such purposes." If that means that the works can be built and operated upon bonds, which in time can be paid by revenues to be derived, it substitutes for taxation, the acqusition of the plaintiff's patrons under the threat of their taxation for deficiencies which is only something worse. But so far as we are considering the application of the provision of the Constitution invoked to the case in hand, it makes no difference whether the works are built on the proceeds of taxation or upon the bonds of the municipality, because all the real and personal property of the village, including that of the plaintiff, is *pledged* as security for the payment of the bonds. That is, while it may be that the works can be constructed without directly taxing the plaintiff, they cannot be, without a pledge of the plaintiff's property, and that in the application of this provision of the Constitution, is no more equal than would be direct taxation.

Let us assume that the village instead of becoming itself the *alleged* competitor, had granted to another private corporation a franchise to construct, maintain and operate a system of water works under the delegated authority of the legislature, and that under the same authority it had conferred upon such second corporation all the powers over the first and over the possible and existing patrons of the first, which the statute in this case confers upon the defendant; power to tax, power to condemn, power to regulate charges, power to tax the inhabitants for deficiencies, etc., etc., would the judiciary uphold the second franchise as being free from condemnation under this provision of the Constitution?

If the defendant, under delegated power of the legislature, will confer upon this plaintiff the power, alone, to fix its own rates, with power to tax the inhabitants of the village to make good its deficiencies, the same power which the defendant has, we will venture to say that plaintiff will keep right on with its business at the old stand, notwithstanding all the other inequalities enacted by the statute and which must necessarily grow out of the relations which exist between the parties as business competitors.

IV.

THE STATUTE UNDER WHICH THE DEFENDANT ACTED OR THE ACT OF THE DEFENDANT, WHICH THE STATUTE AUTHORIZED, WAS VIOLATIVE OF THE FEDERAL CONSTITUTION, IN THAT IT WAS ONE WHICH ENABLED THE DEFENDANT TO TAKE, AND WHICH DID TAKE IN FACT, THE PRIVATE PROPERTY OF THE PLAINTIFF, FOR A PUBLIC USE, WITHOUT COMPENSATION.

It is to a certain extent the fact, that the force of the contentions herein made, turn largely upon the question, whether, under the circumstances of the case, the defendant was, or could be, the competitor, and no more, of the defendant; and the different propositions of this argument are designed to show in part how impossible it is to contend that it is or could be such a mere competitor; and so it is insisted that the statute in its operation, *and by force of its operation*, was one which took the property of the plaintiff, without compensation.

First. All that it took and has taken from the plaintiff *in taxes* to build and maintain its plant, has been a taking of private property without compensation.

The government may take property in two ways, by taxation and by the power of eminent domain, and whether it is taken by one or the other power, does not depend upon the name which a statute gives to the act which confers the power but upon the character of the act.

In the consideration of this subject, therefore, it becomes important to consider the distinction which clearly exists between the power of eminent domain and of taxation.

In *People vs. Mayor, etc., of Brooklyn*, 4 N. Y., 419-424, Judge Ruggles, very clearly stated this distinction, as follows:

"Taxation exacts money, or services, from individuals as and for their respective shares of contribution to any public burden.

"Private property taken for a public use, by right of eminent domain, is taken, not as the owners share of contribution to a public burthen, but as so much beyond his share."

"Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay otherwise than in the proper application of the tax.

"Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain, operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals."

So, as the learned Judge elsewhere says taxation rests upon the maxim, that "he who receives the advantage ought to sustain the burthen."

If we apply these distinctions they show, that under this act, the property taken under the guise of taxes is taken under the exercise of the power of eminent domain and not under the power of taxation.

Every dollar required by this company, or which the statute requires it to pay, for the construction of the village plant, is so much *beyond its share*, because it manifestly obtains no advantage or benefit from the distribution of the tax. On the contrary it is used not for its benefit in any degree, but for its destruction. It does not share with the rest of the community in the public benefit. It receives no protection from the tax and *can* receive none. As the public gives nothing back to this private company, *it is a debtor to it for the* property which it takes. No *duty* required this company to surrender any of its property by way of taxation to construct the village plant.

The provision of the constitution is that private property shall "not be taken for public use without compensation." The idea is that whenever *any* property is taken, personal property, easements, lands, the owner must receive compensation. If he does not receive compensation through the distribution of taxes, as *one of a class* benefited, when it is taken from him in the *form* of taxation, then he must receive it as for property taken under the exercise of the power of eminent domain.

What benefit could have been received by the private company here, for the tax assessed and collected? What benefit which was shared between it and others of a class? What advantage did it receive for the burden imposed upon it?

If the village plant could have been rendered subject to taxation, it would have availed nothing, in the direction of suggesting a mere competitor, because in that case it would be simply taking money out of one pocket and putting it into another.

But the taking of property by the "strong arm," is not confined, in this case to the property taken, in the name of, and under the guise, of taxation.

The plaintiff had been in operation a little over five years, when the village began to legislate for itself on this subject. It had then obtained, we will say, for the purposes of this case, something like two hundred and fifty patrons, all content with the service rendered. These patrons constituted its property,—for in such a case, where a corporation's sole resource is the existence of its patrons, in its ability to use to advantage and profit, the tangible property which it possesses, such patrons *obtained*, constitute its property.

And if such patrons are taken away, *by force of the operation of a statute*, put in motion by the local government whose purpose is to obtain such patrons for itself, the statute surely merits judicial condemnation as one which authorizes the taking of private property for a public use without compensation; while the act, pursuant to the statute, merits the like condemnation for the reason that it actually takes such property without compensation.

We believe we are entitled to go further and to claim that the village itself as a patron, or even as a possible patron, was property of the plaintiff under the circumstances of this case. It constructed its works when the village was, *as matter of law*, in need of being supplied. Its purpose was to supply the village. For that reason it established hydrants, otherwise without use. But by operation of the law, which the *village itself made* "the law of the State," the plaintiff was deprived of its right to consider the defendant even a possible patron. In other words, it was deprived of its franchise, the privilege which had been granted to it of supplying the defendant, ***which was its property.***

> *Gulf and Ship Island R. Co. vs. Hewes*, 22 Supreme Court Reporter, 26, and authorities, page 30.

In the State of New York such *franchises* have recently become taxable as property, and under the statutes of New York the plaintiff's *franchise*, as such, has been taxed by the defendant corporation.

The argument here urged not only supports our proposition but further shows how impossible it is to contend that the defendant acting under "the law of the State," of which we complain, can be the competitor, the rival, *only*, of the plaintiff.

V.

THE ULTIMATE QUESTION TO BE DECIDED HERE, WE MAY SAY, IS WHETHER THE PLAINTIFF'S PROPERTY AND RIGHTS AND THE FIFTY THOUSAND DOLLARS' WORTH OF BONDS WHICH IT HAS SOLD AND WHICH WERE PURCHASED AND ARE NOW OWNED BY THIRD PARTIES, ARE TO BE RENDERED WORTHLESS, OR WHETHER THE VILLAGE SHALL CEASE TO OPERATE THE PLANT WHICH IT CONSTRUCTED, AFTER THIS LITIGATION BEGAN AND IN DEFIANCE OF IT.

And we find at last, if the plaintiff is to fail, *a law of a State*, under which property "lawfully acquired," may be and must be, LAWFULLY destroyed.

CHARLES A. HAWLEY,
GEORGE BARROW,
Counsel for Plaintiff in Error

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901,

NO. 134

THE SKANEATELES WATER WORKS COMPANY, PLAINTIFF IN ERROR,

VS.

THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE, AS PRESIDENT OF SAID VILLAGE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF DEFENDANTS IN ERROR.

This action was brought to restrain the defendants from the construction and operation of a system of water works in the Village of Skaneateles, Onondaga County and State of New York, upon the ground that by virtue of a franchise granted by the said village of Skaneateles to the plaintiff, and a five years' contract to supply water, made between the trustees of the village and the plaintiff that it (the plaintiff) acquired the exclusive right to furnish water to said village and its inhabitants as against said village; that the village is estopped from establishing works of its own although it has the power to grant a similar franchise to another water corporation.

In the year 1887, a franchise was granted by the village of Skaneateles to the plaintiff to supply the village and its inhabitants with water, with a provision that the plaintiff should not charge the village for water supply to it more than $40 per annum per hydrant.

Page 61. Fol. 128.

Under this franchise the plaintiff constructed a plant which should not have cost over $30,000. In the year 18[illegible]9, a contract was entered into between the plaintiff and the trustees of the village for a period of five years by which the plaintiff agreed to furnish water to the village at the rate of $30 per annum per hydrant. One hundred and fourteen of the tax payers of the village filed a written remonstrance against the execution of this contract. They constituted a majority of the tax payers.

On September 14, 1899, a resolution was adopted by the same trustees notwithstanding the remonstrance of the said tax payers, reciting that the plaintiff corporation had failed to complete its works and renewing said franchise, and extending the time of completion of the plaintiff's works until Dec. 1, 1890, on the condition that said franchise should be void if said company should not have completed its works within one year from Dec. 1, 1889, and providing that the contract made by said village with said company should continue to be binding upon said company.

(Fol. 9—14.)

In the latter part of 1889 or 1890, the plaintiff procured a civil engineer to make plans and estimates of the cost of constructing the water plant, and he reported that the same would be $29,000.

(Fol. 269—273.)

Thereafter and before Feb. 21, 1891, the water plant of the plaintiff was completed; cement pipes being used in its construction. A resolution was then adopted by the trustees of the village that the contract above mentioned should commence on the 1st. day of Feb. 1891. (Fol. 14.) This contract with the village therefor expired Feb. 1, 1896.

The plaintiff on the 22nd. day of Aug., 1890, executed a mortgage upon its plant to secure the payment of $40,000 of the bonds issued by it (Fol. 417). Previous to that time it had issued its whole capital stock amounting to $40,000. (Fol. 143.)

In 1894 the stock was increased to $50,000 (Fol. 94.) Upon Feb. 1, 1895 another mortgage was given to secure $10,000 more of bonds issued by the plaintiff (Fol. 16—418.) The amount of stock and bonds issued by the plaintiff was grossly out of proportion to the cost of the plant.

No agitation had arisen in the village against the renewal of the contract at the rate of $30 per annum per hydrant. (Fol. 66.) A short time before its expiration, the plaintiff informed the village that it would not renew the contract for less than $50 per annum per hydrant. (Fol. 22; 23, page 11.) And wrote the village president as follows:

"We are compelled to inform you that we cannot renew this contract at the old rate. The present rate is $30 per hydrant, the rate of renewing will be $50 per hydrant. * * * * * If the village should decide not to take water on the terms proposed, notice will be given of the date when the hydrants will be closed."

(Fol. 64—68.)

A special election of the electors of the village was held to determine whether the contract should be renewed at that rate, and by a large majority it was decided that it should not be done. The plaintiff then dismantled the hydrants and cut off the water supply of the village. (Fol. 72—77 inc., page 34, 35, 36.) And wrote the plaintiff as follows:

"With very much regret, and solely for the purpose of protecting the interests of the Skaneateles Water Works Company, and after consultation with the stock holders, and with their approval and by their direction, I give you formal notice that the hydrants in your village, forty in number, have been closed."

"We give this notice because we wish it clearly understood that if an isolated fire should occur, or if an extensive conflagration should be threatened; there must be no interference with the hydrants; not that we think there would be, but because we have heard it suggested that the village can refuse to enter into a contract for hydrant rentals, and then in the event of a conflagration expect the water company to furnish water with which to extinguish it; while there are some in every community who would expect to forcibly open the hydrants in such an event. We wish it understood that the works of the Company, whether closed or open, are under your protection. We require that they be protected as closed, and in event that they shall be opened by you as a justifiable procedure in the face of great danger, or under your sanction, or by any other person with or without responsibility, for the purpose of extinguishing fires, we shall make a charge against you in each instance of two thousand dollars, as the reasonable value of the service which may be rendered.

"We should say, however, that we have directed Mr. Burton to reduce the pressure on the pipes, as the water is not needed for fire protection, and nothing in the foregoing shall obligate the company in any event to resume the former pressure, or keep the pipes supplied in event of fire."

Water commissioners were then appointed by the village, and a meeting to ballot on the subject, called by the trustees, held on the 9th day of May, 1896, under the statue, (Chapter 181 of the Laws of 1875, and acts amendatory thereto) to determine whether the village should establish works of its own, and levy its taxes therefor. Just previous to this meeting the plaintiff stated that they were willing to furnish water at the rate of $40 per annum per hydrant. At that meeting by a large majority it was decided by ballot that the village should establish its works and water taxes were levied and collected for that purpose. (Fol. 11, page 6.)

After such election the water commissioners endeavored to purchase the works of the plaintiff and offered it $24,000 for the same.

(Fol. 108, page 51.)

The plaintiff refused to accept even $30,000 for them.

(Fol. 106, page 50.)

The village has since constructed a plant at a cost of less than $30,000, and now in successful operation of the same.

(Fol. 92, page 43.)

The Court in 161 N. Y. says at page 170:

That if the discriminating features of the acts of 1894 were eliminated, it would in no wise interfere with the just and proper working out of the general purpose of the act, which is to enable municipalities to provide for an independent system of water works, to be owned and controlled by municipal authorities. Upon this question the plaintiff in error comes to this Court to have determined whether or not the remainder of the statute in question is constitutional.

"The act concerning establishing a scale of water rates was originally enacted by Chapter 507 of the laws of 1889, which is as follows:

Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of one thousand eight hundred and seventy-five, and acts amendatory thereto, may annually establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the water pipes are laid. A day shall be appointed by the board for hearing grievances against such assessment, and said assessment shall be subject to review as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees; upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

§ 2. This act shall take effect immediately."

That act was amended by Chapter 662 of the laws of 1893, which is as follows:

"Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hundred and seventy-five and acts amendatory thereof, may establish a scale of rates for the use of water *and also rates for fire protection* to be assessed on all real property abutting on the *mains or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes.*"

The remainder of the chapter is precisely the same as the Act of 1889.

That act was amended by Chapter 284 of the laws of 1894, which is as follows:

"Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hundred and seventy-five, and acts amendatory thereof, may establish a scale of rates for the use of water *and also rates for fire protection*, to be assessed on all real property abutting on the *mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is* *not used by the owners or occupants thereof for domestic or manufacturing purposes.* A day shall be appointed by the board for hearing grievances against such assessment, and said assessments shall be subject to review as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees. Upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

§ 2. This act shall take effect immediately."

POINTS.

I.

THERE ARE NO EQUITIES EXISTING IN THIS CASE IN FAVOR OF THE PLAINTIFF.

The defendant village has not attempted to confiscate the property of the plaintiff, but has been forced into establishing works of its own by the illegal acts and tyrannical conduct of the water corporation.

The incorporators of the plaintiff entered into a speculative enterprise for the purpose of making money. They obtained from the trustees of the village on the 5th day of July, 1887, a franchise allowing a corporation, to be formed by them, to supply water to the village and its inhabitants (Fol. 379.) Shortly afterwards and on the 12th day of July 1887, they formed the plaintiff corporation. (Fol. 388.)

The statute which the Court of Appeals holds to be unconstitutional became the law June 15, 1889, two years before the plaintiff began the construction of their plant.

In October 1884, the Court of Appeals, of the State of New York, in People ex rel, The Mills Water Works Co. vs. Forrest et al, 97 N. Y., 97, Danforth J. says, at page 100, "The State authorizes the formation of water works companies in its towns and villages (Laws of 1877, page 171,) but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed."

In April, 1886, the General Term of the Fourth Department had decided that the Syracuse Water Company obtained no exclusive rights by a similar franchise (Hun. 635.) That case was affirmed by the Court of Appeals October 8, 1889, (116 N. Y., 168.) so that before plaintiff had expended a dollar, it knew that the Court of Appeals of the State of New York had decided that the granting of a franchise like the plaintiff's did not prevent the granting of a similar franchise to another corporation, and that such franchise and a request of the municipality to supply water did not constitute a contract on the part of the latter to take water, in perpetuity, from the corporation. These decisions were notorious, and with these facts staring them in the face, the plaintiff solicited and obtained the limited franchise, which was all the village could give, taking the chances of the village establishing works of its own, or granting a franchise to another corporation.

The water corporation waited for nearly two years, and until there had been a change in the Board of Trustees, before making an application for a contract. In April, 1889, J. D. Barrow, a brother of George Barrow, the attorney, and principal promoter of the water corporation, had become one of the village trustees. Mr. Shepard had also become another trustee. He was a relative and business partner of Mr. Hall, who was then holding $10,000 of the stock of the Water Company, and a director therein. Upon April 20, 1889, these two trustees, and one Kelly, another trustee, in the absence of the president, adopted a resolution authorizing a five years contract between the water corporation and the village for the sum of $30 per hydrant per annum. A written remonstrance was filed against the execution of this contract, signed by one hundred and fourteen of the tax payers of the village, constituting a large portion of the same. The population of the village of Skaneateles was only 1559 in 1890. (Red Book 1890, page 522.) Subsequently, and in April, 1889, a contract was entered into between the village and the water corporation to take water from said corporation for the period of five years at the rate of $30 per hydrant per annum. On the 14th day of September, 1889, these *same* trustees, at a special meeting in the absence of the president, notwithstanding said remonstrance, adopted a resolution renewing said franchise, ratifying said contract, and extending the time of the completion of plaintiff's works until Dec. 1, 1890. (Fol. 13.)

Although, this contract was made by these trustees against the will of the tax payers, there was no further opposition thereto. It expired by its terms Feb. 1, 1896, and no agitation had arisen among the inhabitants against its renewal. When, however, it was about to expire, the plaintiff, finding it difficult to pay interest on its watered stock and bonds, as it claimed, endeavored to *force* the village to give it $50 per annum per hydrant, in violation of the terms of its franchise by threatening *to cut off* the water supply of the village, if the plaintiff's demands were not complied with, and on January 2, 1896, served a written notice on the trustees that the water supply would be cut off, unless $50 per annum per hydrant was paid. A meeting was then called of the electors of the village, who voted on the 28th day of January, 1896, against the renewal of the contract by the village at the rate of $50 per annum per hydrant, and the trustees refused to renew the same at that rate. The plaintiff then *dismantled* the hydrants and *cut off* the water supply of the village.

The same state of facts existed which had previously arisen in the City of Syracuse. It was owing to the exorbitant demands of the Syracuse Water Company having a similar franchise, that said city granted a new franchise to another water corporation. Had the course adopted by the plaintiff been pursued by the Syracuse Water Company, and the water supply of that city cut off, there would have been a public riot.

The Skaneateles Water Works Company, with no binding obligation requiring the village to take water from that corporation, has goaded and prodded the inhabitants of the village into establishing works of its own.

After the plaintiff had created this sentiment against it by its extortionate demands, and unlawful acts, and water commissioners had been appointed, and an election was about to be held upon the question whether the village should own its own works, the plaintiff offered to supply water at the rate of *$40 per annum* per hydrant. The electors, however, determined that the village should have its own water system, instead of the plaintiff's dictating the price of water, and no one can blame them for doing so under the circumstances.

After such election, the water commissioners, before building their works, in good faith endeavored to purchase the plant of the plaintiff and offered $24,000 for the same. They would have been willing to pay $30,000. The plaintiff's plant was laid with cement pipes, and was not worth over $15,000. The plaintiff instead of accepting this offer, or considering the same, informed the water commissioners that it would not take $30,000 for its property, and requested them to institute proceedings to condemn their plant.

The commissioners had before their eyes the large awards made and the enormous counsel fees paid, by the City of Syracuse in condemnation proceedings of water rights of moderate value on the Skaneateles outlet, which were opposed by the same able counsel who are acting for the plaintiff in this action, and wisely refrained from instituting such proceedings.

The water corporation had no right to *dictate* to the village what sum the village should pay for the use of water. They were obliged to furnish water when requested. If no agreement was reached, then it would have to be ascertained by some method of legal procedure. They could not, in any event obtain more than $40 per hydrant. 32 Hun 530

It is quite evident, from the evidence in this case, that the plaintiff *caused* the action of the village of which it complains, by its intemperate conduct, and violation of the terms of its franchise.

It is questionable, whether the acts of the plaintiff in refusing to furnish the village with water at less than $50 a hydrant, and cutting off the water supply of the village, was not such a violation of its franchise, as to entitle the defendant to treat the same as rescinded. These facts were set up as a defense in the answer, but the referee did not find it necessary to pass upon those questions. (Fols. 562—566.)

Where a corporation is engaged in the transaction of business by virtue of a municipal franchise, the granting of a similar franchise to another corporation, or the transaction of the same business by the municipality itself, necessarily involves a great injury to the property of the first corporation in the field, and sometimes its total destruction. This is a *risk of the trade* which corporations take who solicit franchises from municipalities for the purpose of making money.

The village has no power to levy any tax except the general tax and the tax for fire protection authorized by section 230, Chap. 414, Laws of 1897.

POINT

11.

THE VILLAGE IS NOT ESTOPPED FROM ESTABLISHING A WATER SYSTEM OF ITS OWN BY THE FRANCHISE GRANTED TO THE PLAINTIFF. THE CONTENTION OF THE PLAINTIFF IN ERROR TO THE CONTRARY IS DIRECTLY OPPOSED TO ALL THE AUTHORITIES UPON THE SUBJECT.

Where a simple franchise is granted by a municipality to a corporation, all the latter acquires is the right to exercise *that franchise*. The only contract the grantor makes, express or implied, is to allow the grantee to *carry on* the business authorized by the franchise. The municipality in such cases retains all the rights it has not expressly granted. It may grant similar franchises, or engage in business of the same nature. If it can grant similar franchises to others, such franchises and rights are reserved, and not included in the original grant. What it can confer upon others, it may exercise itself. The rule is fully established in England and America, that public grants are to be construed against the grantee; that acts granting franchises to corporations are to be construed strictly according to their terms; that the party accepting the franchise takes nothing by implication against the *power* making the grant, or against other corporations or individuals; that the only contract on the part of the *grantor* is that it will not *do* any act, or *refrain* from doing any act, other than to allow the exercise of the franchise.

Syracuse Water Company vs. City of Syracuse,
116 N. Y., 167.
New Orleans Gas Company vs. Louisville Light Co.
115 U. S., 650.
Matter of the City of Brooklyn,
143 N. Y., 596, affd. 166 U. S., 685.
Warsaw Water Co. vs. Village of Warsaw,
16 App. Div., 161 N. Y., 502.
Louisville Gas Company vs. Citizens' Gas Company.
115 U. S., 683.
Fort Plain Bridge vs. Smith, 30 NY 44
Hamilton Gas Co v Hamilton 146 U.S 258

~~*30 N. Y., 44.*~~

Colby University vs. Village of Canandaigua,
69 Fed. Rep., 671.
Auburn vs. Douglass,
9 N. Y., 444.

The plaintiff in error, however, contends that although the defendant village might grant a similar franchise to another water corporation, it has no right to construct or maintain a system of its own. An exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply a privilege of laying its mains in the street, with a covenant for the payment of hydrant rentals, without any words of exclusion.

The *franchise*, in this case consists of a resolution adopted by the village granting the application of certain persons to allow a corporation, to be formed by them, to supply the village and its inhabitants with pure and wholesome water, pursuant to the provisions of the Water Companies Act, upon the conditions, among others, that said corporation shall not charge or collect from said village, at any time, a greater sum than $40 per annum for each hydrant furnished for the use of said village, and at that rate shall furnish all hydrants required by said village, at such places as shall be designated by its trustees.

The only contract contained in reference to the supply of water, is, that the plaintiff shall furnish water to the village and its inhabitants, *when requested* to do so, and is, in that respect, precisely the same as the Syracuse Water case.

It was held that in the Syracuse Water case that it was not to be implied from such an obligation on the part of the water company, that the municipality was required to *take water* necessary for its uses from the water company alone, and to *refrain* from obtaining it from any other source.

It has been repeatedly held in cases of franchises granted by municipalities, that no obligation is to be *implied* on the part of the *grantor* on account of the obligation *imposed* by its term upon the *grantee*. That although the grantee may be *obliged*, when requested by the grantor, to *perform* certain acts, that there is no corresponding obligation that the *grantor* shall *request* the performance of such acts by the grantee, and shall not *perform* the same himself, or *resort* to other parties.

Where a simple franchise is granted, the only acts which the grantor promises *not* to perform are those which *prevent* the exercise of the franchise by the grantee. Acts which may impair its value, and even lessen the same so much that the privileges become almost worthless, performed by the grantor, or another corporation to whom it has given similar rights, are not *repugnant* to the grant. In case of an *exclusive* franchise, the giving of similar privileges, to another corporation, or the exercise of the same powers by the grantor, would be so. This is the distinction between a simple and exclusive franchise.

The only right given to the plaintiff by the resolution of the village in this case is the right to supply the village and its inhabitants with water *when requested*. By establishing works of their own they have not *prevented* plaintiff from doing so. There is no implied obligation on the part of the village to *take water* from the plaintiff corporation any more than on the part of its inhabitants to do so. The village no more violates its franchise by establishing works of its own, than by failing to *request* the plaintiff to furnish water.

In the case of Colby University against the Village of Canandaigua, in which Judge Coxe wrote an elaborate opinion, the water corporation was formed under the general law, and acquired substantially the same rights as the plaintiff, by the resolution of the village granting the application and allowing the use of its streets.

A. IF THE FRANCHISE IN THIS CASE CONTAINS A CONTRACT ON THE PART OF THE VILLAGE TO TAKE WATER FOR ITS OWN USE IN PERPETUITY FROM THE PLAINTIFF, AND NOT TO BUILD WORKS OF ITS OWN, IT IS VOID BECAUSE THE VILLAGE HAD NO AUTHORITY TO ENTER INTO ANY SUCH AGREEMENT.

A municipality can not, without express legislative authority, grant exclusive rights.

1. Dillon on Municipal Corporations,
4th Edition, Sec. 692—696.
State vs. Cincinnata Gas Company,
18 Ohio st., 262.
Indianapolis vs. Indianapolis Gas Co.,
66 Ind., 396.
Norwich Gas Co. vs. Norwich City,
25 Conn., 19.

Nor can any municipality enter into a contract with another corporation or to exercise the powers conferred upon it by the legislature. The trustees of the village are not vested with any such authority. Such an act is in the nature of an exclusive franchise.

A municipal corporation can bind itself by contract only so far as it is authorized to do so by statute. It cannot enter into an agreement to take water forever from a water corporation, unless authorized to do so by the legislature. It cannot curtail by contract the right to exercise the powers vested in its legislative board.

Syracuse Water Works Co. vs. The City of Syracuse.
116 N. Y., 167.

Municipal corporations have no power as a party to make contracts which shall control or embarrass their legislative powers and duties.

Mayor vs. Second Ave. R. R.,
32 N. Y., 261.

There is nothing in the statutes which prevents a state from granting to municipalities the same right to construct and operate water works that it does to private corporations. The fact that such municipality may become the more vigorous competitor, does not prevent the exercise of such rights.

POINT

III.

BY THE FRANCHISE GRANTED BY THE VILLAGE TRUSTEES TO THE PLAINTIFF, AND THE SUBSEQUENT FIVE YEARS CONTRACT, THE VILLAGE DID NOT ELECT TO TAKE WATER FROM THE PLAINTIFF FOREVER, AND AGREED NOT TO ESTABLISH A PLANT OF ITS OWN.

There are some Pennsylvania cases holding under certain peculiar statutes of that state, that boroughs may either obtain a supply of water by contract, or establish works of their own, but having once elected to supply themselves by contract, the power to establish works of their own is gone. Those cases are not applicable for two reasons.

1. The statutes of the State of New York bearing on the question are totally dissimilar, and manifest an entirely different intent.

2. The *village* of Skaneateles has never elected to supply itself with water by contract.

The act of 1873, chapter 737, under which plaintiff is incorporated, by section 3, authorizes and empowers the companies organized under the act to supply the authorities, or inhabitants of villages where they are located with such rates and cost to consumers as they can agree upon. The general village law, at that time, contained no provision on the subject of water, except that the trustees were allowed to construct and maintain reservoirs and cisterns and supply them with water for the use of fires. (Chap. 291, Laws of 1870, pp, 683.) By Chap. 181, Laws of 1875, General Village Law, villages were authorized to establish works of their own, but the trustees were not empowered to contract for a water supply. To cure such want of power, Chap. 129 of the Laws of 1879, amending the village law, was enacted, which was in force when the contract in question was made. That statute amending the general village law authorized the trustees of a village to contract for a water supply, provided, however, that no such contract be made for a longer period than five years, unless the same should be adopted by a vote of the tax payers of the village.

By Chap. 422 of the Laws of 1885, amending said act of 1873, such water corporations were *required* and *empowered* to supply water to the villages where they were organized; and the trustees of all villages were authorized to enter into contracts for their water supply with any water company organized in the State, not exceeding a period of five years without a vote of the tax payers, and for a period not exceeding thirty years, if authorized by such vote.

Sec. 81 of the General Transportation Law, Chap. 230 Laws of 1894, contains similar provisions.

The contention of the appellant is as follows:

That in the year 1889, the village was authorized to establish a water system of its own, (Chap. 181, Laws of 1875;) or the trustees of the village might enter into a contract with a water corporation for a supply of water for a period not exceeding five years, unless authorized by a vote of the tax payers (Chap. 129, Laws of 1879; Chap. 422, Laws of 1885;) that the granting by a village to a water corporation formed under the general act of the franchise to supply water, and lay mains in the village streets, which must necessarily precede a contract for a water supply for the period of five years, is an election by the village requiring it to take water for its own use from such water corporation forever, and not to establish works of its own.

This proposition seems absurd upon its face, to-wit: that an act authorizing the trustees of a village to enter into a contract with a water corporation for a supply of water for five years, and limiting them to that item, makes the franchise necessarily granted to the water corporation before such contract can be made, a perpetual agreement to take water from the same company, and prevents the village from exercising similar rights.

It is obvious that by the provisions of the statute above cited, allowing the trustees to contract for a supply of water for a limited period only, and the village to establish works of its own, standing side by side, that the legislature could not have intended that the village should elect which system of supplying the village should be adopted, and such election should be final and conclusive on the village.

The fact that contracts are to be made for certain restricted periods of time, with or without the vote of tax payers, shows a contrary intent on the part of the legislature, and is fatal to the appellant's contention.

The provisions of Sec. 22, Chap. 181, Laws of 1875, authorizing but not *requiring*, the water commissioners of villages which may, or may not have established water systems of their own, to condemn at any time the plant of existing water corporations, are also inconsistent with the Pennsylvania theory of election, and shows that it was the intent of the legislature of this State that villages should be allowed to contract for a water supply, or supply themselves and change from one system to the other at any time they saw fit. These views are also confirmed by the general village law, (Chap. 414, Laws of 1897,) passed since the commencement of this action, and repealing chapter 181 of the Laws of 1875, and chapter 129 of the Laws of 1879. By section 229 of the new law, the trustees of villages are authorized to enter into contracts with any corporation, or individual, for a water supply for limited periods, as provided in prior acts.

Sec. 230 reads as follows:

> "A proposition may be submitted at a village "election for the establishment of a system of water works for supplying the village and its inhabitants with water, or for the acquisition of an "existing private system, and at an expense in "either case not exceeding the sum stated in the "proposition."

This seems definitely to settle the question, for the legislature has expressly given the electors of a village where there is an existing private system, the right to determine by vote whether such system shall be condemned, or the village shall establish works of its own. There is no existing private water corporation doing business in any village in this state, which has not been granted a franchise, which requires it to supply water to the village and its inhabitants, either by its special act of incorporation, or by resolution of the village in pursuance of the general water act.

If our statutes can be construed in the same manner as the Pennsylvania statutes, it must be that a contract made by the *village* in pursuance of the vote of its *tax payers* shall have the effect to constitute an election on the part of the village, and not a franchise granted by its trustees. It seems absurd to say that the trustees of a village by granting the application of a water corporation to supply the village and its inhabitants with water, can elect from the village that it shall take water from that corporation forever, and shall not establish works of its own. The trustees have no power to bind the village in that regard.

In the case of White vs. the City of Meadville, 117 Pa., 643, it appears that after the electors had voted that the borough should not establish works of their own, the trustees made a contract with the plaintiff. In that case the directors had indirectly sanctioned the supply by contract.

In the case of Metzger, 178 Pa. St., 1, it does not appear whether there had been any vote of the electors or not.

The village in this case has never elected to adopt the course of supplying itself with water by contract, and the trustees have no power to bind the village in that regard without a previous vote of the tax payers. The evidence shows that the only contract made between the plaintiff and the village was made by the trustees directly against the wishes of the tax payers, and that they endeavored to prevent its execution.

Therefore the Court below held that the franchise here acquired was not exclusive, and did not prevent the village from proceeding under the acts of 1873, and the acts amendatory thereof and that the plaintiff conceded the same.

POINT

IV.

CHAPTER 181 OF THE LAWS OF 1875 IS NOT UNCONSTITUTIONAL UPON THE GROUND THAT IT IS A LAW IMPAIRING THE OBLIGATION OF A CONTRACT.

The counsel claimed in the Court below that the act under which plaintiff was incorporated (being chapter 737 of the laws of 1873 as amended by chapter 422 of the laws of 1875) required water companies formed thereunder to supply water to the villages, in which they were organized, and to their inhabitants, and provided that application might be made by the persons about to form such a corporation for leave to furnish such water supply, and upon the granting of such application, a corresponding obligation arose upon the part of the village, to take water for its own use, forever from the corporation organized pursuant thereto.

The Courts have held over and over again, that no such obligation is to be implied upon the part of the municipality. It is immaterial whether the contract on the part of the water Company is contained in its special charter, as in the Warsaw case, decided with this in the Court below, and the Syracuse case, under which it is incorporated.

The village grants the franchise to supply water, when it grants the application of persons about to form a corporation for that purpose.

This case cannot be distinguished from the case of Colby University against the Village of Canandaigua. In the Canandaigua case, the water corporation was formed under the act of 1873, and after the application of its incorporators to supply water had been granted by the village as required by that act.

Although the act of 1873, previous to the amendment of 1885, authorized and empowered, but did not require the company formed thereunder to supply water to the village where it was organized, no doubt such obligation arose on the part of the water company from the granting of the application made to supply water to the village and its inhabitants. The amendment of 1885 to the act of 1873 did not therefore impose any new obligation in that regard upon the water Company.

It was not the design of the Legislature by chapter 422, of the laws of 1885 to impose upon the village, by the granting of the application, any obligation to take water from the Water Company organized thereunder in perpetuity because in the same clause of the act it is provided, that the trustees of the village may enter into a contract to take water from such corporations for a limited period only.

Nor does the resolution adopted by the village create any contract on its part to take water for its own use. It recites, that the application to supply water under such act is granted upon the condition that the Company shall not charge a greater sum than $40 per annum for each hydrant furnished and shall furnish all hydrants required by the village, and restore the streets where pipes are laid to their former condition.

These conditions attached to the grant did not enlarge plaintiff's rights, and at the most, only obliged the plaintiff to furnish water to the village when requested by it to do so.

Previous to 1875 villages had no power to supply themselves with water by contract, or establish works of their own. The general village law of 1870, Chap. 291, did not give them such power. Chap. 737, of the laws of 1873, gave water companies the power to supply water, but did not give villages the right to contract for such water supply, when they had not already such powers. Villages were given this power by Chap. 181 of the laws of 1875. Section 7 was added by Chap. 129 of the laws of 1879, and provided that the village trustees should have power to enter into contracts for a supply of water for limited periods only. Then for the first time villages were authorized to contract with Water Companies for water supply by the legislature. By Chap. 422, of the laws of 1885, amending chapter 737 of the laws of 1873, the trustees of the village were authorized to enter into contracts, with any water corporation in the State. By chapter 678 of the laws of 1896, these provisions were made a part of the Transportation Corporation Law.

The defendant village has not delegated to the plaintiff corporation its whole power to supply itself and its inhabitants with water, nor has it covenanted not to exercise such rights itself, nor has it deprived the plaintiff of its power to supply water to the village and its inhabitants.

The granting of a franchise by a municipality to a corporation to do certain things that a municipality might itself do, is not a delegation of *all* the power of the municipality in the matter, but only to the *extent* of the grant. Thus a franchise to supply water to a village and its inhabitants *when requested*, does not prevent the granting of a similar franchise to another corporation. For the same reason a municipality can establish works of its own. It has only delegated to the corporation the right to supply the village and its inhabitants with water when *requested* by them to do so. The village or its inhabitants, may fail, or determine not to make such request. The establishment of works of its own by the village is such an act, which the village has a right to perform. The construction and operation of a water system by the village does not deprive the plaintiff of its *power* to perform its franchise, or of anything essential to the enjoyment thereof. The village, if it see fit, may still take water of the plaintiff, and its inhabitants may do so. As the franchise is only to supply such water as the village shall *request*, the plaintiff is not prevented from supplying the village by the establishment of works of its own, but by the failure of the village to *request* it to furnish water.

The plaintiff would be *prevented* in the same manner from performing its franchise by the granting of a similar franchise to another corporation, and the taking of water from such corporation. The plaintiff would thus be deprived of the village as a customer. This precise question was passed upon in the Syracuse Water case, and in this case in the Court below.

The fact that the village may prove the more favored competitor, or that the competition may not be upon equal terms, does not deprive the plaintiff of the *power* to compete, but only impairs the *value* of its franchise. Many reasons exist why this might be so. The source of supply may be better, the municipality is not required to pay dividends, but only interest upon its bonds, its credit is better, and the rate of interest paid on loans necessary to build the works is lower. It can furnish water at lower rates.

If the act under which plaintiff is incorporated, and the granting of the application by the village constitutes a contract on the part of the village to take water for its own use from the plaintiff, the act of 1875 does not impair that contract. Notwithstanding the village has constructed works of its own, it may take water from the plaintiff, and if it refuses to do so, the plaintiff has a remedy at law by right of action for damages, and is not entitled to maintain this action.

If, on the other hand, as we claim, no such obligation exists, then there is no contract which the act has impaired.

There is nothing in Chap. 181 of the laws of 1875, which by force of *law* prevents competition on equal terms between the plaintiff and the village, or deprives the plaintiff of the *power* to compete.

Section 18 of such act provides that the water commissioners may borrow money upon the bonds of the village and appropriate the moneys so obtained to supplying the village with water. Section 15 provides that the net annual receipts from water rents shall be applied to the payment of interest on the bonds and the creation of a sinking fund for the payment of principal. Section 16 provides, that in case the net annual receipts in any year shall prove insufficient to pay the interest and any principal falling due in that year, not paid from the sinking fund, such deficiency may be levied and assessed on the taxable property of the village, the same as other taxes.

It cannot be said as a matter of *law*, or of *fact*, that the inhabitants of the village would be prevented by these provisions of taxation from taking water from the plaintiff corporation, and that they destroy, or even impair, the *power* of the corporation to exercise its franchise so far as the inhabitants are concerned. It is not probable that the net water receipts will not pay the annual interest on the bonds, amounting to $1,500, or that the plaintiff corporation will have to be taxed for the payment of such interest and principal, and there is no evidence that any taxes have been, or will be, levied upon the plaintiff's property on account thereof.

The village also contends that since the granting of plaintiff's franchise, the above section 16 of the general village law has been amended by Chap. 284 of the Laws of 1894. This act, as well as Chap. 181 of the laws of 1875 has been repealed by the general village law, Chap. 414 of the laws of 1897.

Section 230, however, of the last mentioned law provides as follows:

"A building, and the lot upon which the same stands, in or on which water from the water works is not used, situated within five hundred feet of a hydrant *may* be assessed by the Board of Water Commissioners for fire protection."

If we assume that assessments under that section would cause the customers of the plaintiff to take water from the village, it does not render the prior act of 1875 unconstitutional. It is optional with the water commissioners to make such assessment and it has not been done. If such provision of the act of 1897 impairs the obligation of a contract, the plaintiff has its remedy by a suit to restrain the levying of such tax upon itself, and the other inhabitants of the village not using the water supplied by the village.

It cannot be said, therefore, that the act of 1875 is unconstitutional, because it impairs the obligation of a contract.

The city of Syracuse, under its charter had no power to erect water works of its own, and levy taxes for the building and maintenance of the same at the time of the action brought by the Syracuse Water Company. The power to do so was given by Chap. 291 of the laws of 1889, passed after the decision of the Syracuse water case.

If section 230 of Chap. 414 of the laws of 1897 has the indirect effect of injuring or destroying the plaintiff's franchise or its power of competing, by depriving it of its customers, or is unjust and inequitable, the remedy of the plaintiff is not with the Courts but with the Legislature.

People vs. Mayor,

4 N. Y., 419.

POINT

V.

CHAPTER 181 OF THE LAWS OF 1875, IS NOT UNCONSTITUTIONAL UPON THE GROUNDS THAT IT AUTHORIZES THE TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE WITHOUT COMPENSATION, OR THAT IT DEPRIVES THE PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The applicant's contention is that the village is authorized to construct a plant by taxation and levy taxes upon all the property of the village for that purpose, including the property of the plaintiff corporation, and that such assessment upon the property of the plaintiff is a taking of private property without any compensation whatever, and a taking of the property of the plaintiff, without due process of law.

As before argued, under the act of 1875, the village is authorized to borrow money to construct its water works, and if the net water receipts are not sufficient to pay interest and principal, to levy taxes therefor. As a matter of fact, loans are made by the village for the purpose of constructing the works, and if the principal of such loans is not paid from the receipts, the debt is renewed and extended. There is no evidence in the case that the defendant village has ever levied any taxes upon the property of the plaintiff on account of the construction and maintenance of the water works under the law of 1875, or that it is probable that it will ever be obliged to do so. The receipts will be sufficient to pay interest and expenses.

Hendryson v Hinderer 193 US 372

A. If the provision of Chap. 181, authorizing the property of the plaintiff to be taxed for the maintenance and operation of water works established by the village is unconstitutional, the rest of the act still remains valid.

If such tax should be levied upon the property of the plaintiff, it would have the right, if the provision in question is unconstitutional, to maintain an action to restrain the assessment and collection of such tax.

B. The assessment against the property of the plaintiff, authorized by said Chap. 181, is an exercise of the power of taxation vested in the state government. Private property may be taken for public use by taxation, and the tax payer receives, or is supposed to receive, just compensation in the benefits conferred by government, and in the proper application of the tax.

The remedy against unwise or unjust modes of taxation is to be sought from the legislature department of the government, and not from the judiciary.

People vs. Mayor,

4 N. Y., 419.

Absolute equality in laying the burdens of taxation, as shown by experience, is impossible of attainment, and is not an insuperable object to a law that it does not accomplish that result. In the consideration of the effect and meaning of laws imposing taxes, it would undoubtedly be the duty of the court to so construe them, if possible, as to avoid unequal and double taxation, but in determining the question of legislative power we are precluded from entertaining such considerations, and must be governed by the constitutional authority conferred upon the legislative body. In performing the duty of levying taxes for the support of the government, State legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no right to interfere with the exercise of the legislative discretion.

People vs. Home Insurance Co.,

92 N. Y., 347.

A gas corporation may receive no benefit from a tax to support a water system. Yet the law authorizing such tax, is not unconstitutional.

It is only where a tax law transcends the legislative power that the courts can interfere.

People vs. Commissioner of taxes,

104 N. Y., 250.

The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded.

In the Matter of Van Antwerp,

56 N. Y., 265.

The two clauses of the Constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, have no application to the exercise of the taxing power.

People vs. Lawrence,

41 N. Y., 140.

Howell vs. City of Buffalo,

37 N. Y., 270.

It is a part of the legitimate exercise of the state power of taxation to ascertain, subject to no judicial review, the public burdens to be borne, and the persons or classes of persons who are to bear them.

Brewster vs. City of Syracuse,

19 N. Y., 118.

The plaintiff has quoted language used in the following cases in his brief, but in none of them was the property of the plaintiff claimed to have been taken by taxation, except in the case of Davidson vs. New Orleans, and in that case the assessment was held valid.

In re Jacobs, 98 N. Y., 98, a law prohibiting the manufacture of cigars in tenement houses in certain cases was held unconstitutional.

In People vs. Otis, 90 N. Y., 481, it was held that an act discharging the City of Yonkers from liability upon certain negotiable bonds issued by it upon the delivery by it of certain duplicate bonds to the Manhattan Savings Institution, was unconstitutional.

The quotation of appellant from Davidson vs. New Orleans, 96 U. S., 97, is from the opinion of Justice Bradley. The opinion of the court was delivered by Justice Miller, who said a law may violate some provisions of the state constitution against unequal taxation; but the federal constitution imposes no restraints upon the state in that regard.

In Pompeyly vs. Green Bay Co., 13 Wall, 66, an action of trespass on the case was brought for over flowing the plaintiff's land, and the defendant justified under an act of the legislature authorizing the construction of a dam, which was held void.

C. If the provisions in the act of 1875, authorizing the taxation of the property of the plaintiff is unconstitutional for any reason, the rest of the act is not rendered void thereby.

The plaintiff can obtain all the relief to which it is entitled by an action to relieve itself from such assessment, and restraining the same, if such an assessment should be made.

D. Section 230, Chap. 414, of the Laws of 1897, passed after the commencement of this action, does not render Chap. 181, of the Laws of 1875, unconstitutional.

If such an act is not a proper exercise of the legislative power in regard to taxation, and is void as a taking of the property of the plaintiff without just compensation, or due process of law, the other provisions of the act authorizing the establishment of works of the village are not rendered unconstitutional thereby. Still less is the previous act of 1875 rendered void.

The theory of the appellant is that said section 230 is unconstitutional, because it taxes persons owning buildings in the vicinity of hydrants for protection for fire purposes, if they do not use the water furnished by the village. This is the only one of the acts referred to which could have any tendency towards preventing the present customers of the plaintiff corporation from ceasing to take water supplied by it, and taking the water furnished by the village. The water commissioners are not *required* to make such assessment, and may see fit never to do so.

POINT

VI.

THE VILLAGE LAW OF 1875, AND THE WATER SYSTEM ESTABLISHED BY THE DEFENDANT VILLAGE THEREUNDER, DOES NOT DIRECTLY OR INDIRECTLY TAKE AWAY, OR DESTROY, THE PROPERTY OF THE PLAINTIFF.

The plaintiff had no contract with the village, by which the latter was obliged to take the water furnished by it; the village may still request the plaintiff to supply water, if it sees fit to do so, notwithstanding the establishment of works of its own; the customers of the plaintiff are not *prevented* from taking water from the plaintiff by the construction of the plant of the village; nor is such result a necessary or probable effect of the act of 1875, and the taxation authorized thereby.

If the plaintiff loses any of its customers after the plant is established by the village, such loss cannot be attributed to the effect of any *act* passed by the legislature, unless it is section 230 of the Laws of 1897, which became a law after the commencement of this action. That section allowing assessments to be made by the water commissioners for fire protection upon all buildings, where the water furnished by the village is not used, is *permissive*, and the power given to the water commissioners thereby may never be exercised. If that section is unconstitutional, and such power should be exercised, the commissioners might be restrained by a proper action from making such assessment either upon the plaintiff corporation, or upon its customers.

The only argument of any weight against the constitutionality of Chap. 181 of the Laws of 1875, set forth in plaintiff's brief in the Court below, is that it authorizes *taxation* of the property of the plaintiff to construct and maintain the water works established by the village, if the receipts therefrom are insufficient to do so, although it does not appear that such power will ever *necessarily* be exercised and there is no evidence that such taxes have been levied.

If, however, those provisions for taxation, or section 230 of the Laws of 1897 are unconstitutional, the remainders of the acts of 1875 and 1897, allowing the village to establish works is not rendered void thereby, as by proper action the plaintiff could restrain the collection of such taxes out of its own property, and out of the property of its customers, under the act of 1897.

As before argued, the remedy of the plaintiff of the alleged injustice is with the courts and not with the legislature.

POINT

VII.

CHAPTER 181, OF THE LAWS OF 1875, DOES NOT VIOLATE THE PROVISION OF THE CONSTITUTION THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JUR-

ISDICTION THE EQUAL PROTECTION OF THE LAWS.

The appellant claims that it has that effect because the village is given power to tax the private water corporation for the construction and maintenance of its plant, to condemn its property, and regulate its charges to customers.

As far as taxation is concerned, that power will probably never be exercised; it may be eliminated from the act if unconstitutional, and the remainder stand; it is not such an exercise of the taxing power of the government as will be reviewed by the courts.

The act does not give the village power to regulate plaintiff's water charges to customers.

The legislature has power to authorize the condemnation of any property for a public use.

> *West River Bridge Co., vs. Dix,*
> *6 How., 507.*

This includes franchises of every description, whether exclusive or not, and it is not apparent how the exercise of such power is unconstitutional upon the ground that it deprives water corporations of the equal protection of the laws.

> *Cooley on Constitutional Limitation,*
> *5th edition, Sec. 341.*

It is submitted that municipalities have been given power by the legislature to establish works of their own, and to engage in the *business* of supplying water to their inhabitants for their own benefit, and the benefit of the residents of the municipalities. A supply of better water is thus generally obtained for consumers, and the rates required to be paid are lower. It is probable that the magnificent water system of Syracuse would not now be in operation, if the water company in that city had succeeded in defeating municipal ownership at the polls, as they tried to do. Exorbitant charges of the water corporation are also prevented.

The principal object of authorizing villages to establish water systems of their own undoubtedly was to enable them to engage in the water business, and to supply their inhabitants, rather than to supply themselves.

POINT

VIII.

THE SUBSEQUENT ACTS OF THE LEGISLATURE KNOWN AS CHAP. 507 OF THE LAWS OF 1889, AND CHAP. 662 OF THE LAWS OF 1893, AND CHAP. 284 OF THE LAWS OF 1894, AMENDING SAID ACT OF 1889, DO NOT RENDER THE PROVISIONS OF THE ACT OF 1875 AUTHORIZING VILLAGES TO ESTABLISH THEIR OWN WATER PLANTS UNCONSTITUTIONAL AND VOID.

These subsequent acts are *independent* acts, and do not purport to be amendments to the act of 1875, nor are they added as sections thereto. They are not incorporated with the act of 1875, so as to affect the constitutionality of its other provisions. They simply confer certain powers of taxation upon water commissioners of villages to be exercised, or *not*, as they deem fit. In villages where there is no existing water plant in competition with the municipality, the exercise of such power is not forbidden by the constitution.

These acts do not form an ingenious device to deprive existing water corporations of their customers, but were passed to enable municipalities where there are no private plants to levy a frontage tax on all real estate benefited by the water supply. These provisions have come from the special charter of different cities and villages of the state, where water is furnished by the municipality alone, and there is no competing company.

In spite of the somewhat harsh suggestion of the Court below, that a village that would refuse to condemn an existing plant would not hesitate to impose a frontage tax to drive the competing water corporation out of existence, the village of Skaneateles has never assessed, or proposed to assess, such frontage tax. It may have been left by the legislature *discretionary* with the water commissioners to impose such tax, so that in case of villages where there were existing water corporations it should not be levied.

If the subsequent acts were unconstitutional because they dealt with a subject not contained in their title, could it be for a moment claimed that the prior act of 1875 was rendered void thereby.

A power of taxation granted by the statute which is unconstitutional, where the exercise of such power is discretionary, does not of *itself* impair the value of property subject to taxation thereby. It is only the *exercise of* such power that constitutes a taking of property for public use without just compensation, or due process of law, and when such exercise is attempted, it may be restrained in suits brought by those who would be injured thereby.

Where powers of taxation conferred upon municipal authorities by general statutes cannot be lawfully exercised in the case of a *certain* municipality because of the circumstances existing therein, but the same are easily separable from the main provisions of the act to which they are a subsequent independent enactment, and the exercise of such powers is made discretionary with such authorities, it cannot be said that a voter under the original act is influenced by his ignorance that such powers are unconstitutional. When he casts his vote, whether the provisions in question are constitutional or not, he knows the same may never be exercised, and his vote is not affected by the power, or want of power to exercise the same, when such exercise is optional.

The Court cannot assume that the elector was induced to vote for water taxes by the Law of 1894. The plaintiff must prove that such was the fact to take advantage of it.

People vs. Kinney,

96 N. Y., 294.

The point is not whether the provisions of a statute which are adjudged to be unconstitutional are contained in the same section, for the distributions of sections are purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

Cooley on Const. Lim.,

page 178.

When part of a statute is unconstitutional that does not affect the validity of the remainder, unless the provisions are so inter-dependent that one cannot operate without the other, or are so related, in substance and object, that it is impossible to suppose that the legislature would have passed the one without the other.

If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, it must be retained and this is so although the portion to be condemned is found in the *same section* with that sought to be retained.

People vs. Kinney,

96 N. Y., 294.

The case last cited seems directly in point. In that case an act for the election of alderman in the City of New York contained a provision prohibiting the electors from voting for more than two-thirds of the whole number to be elected. An action of *quo warranto* was brought to test the title of the aldermen elected under the act, claiming that this provision was unconstitutional. The Court held that it was void for that reason, but that the aldermen were duly elected because it did not appear that any voter *claimed* the right to vote for all six aldermen, and was *denied* the right.

It would be a most dangerous doctrine to establish, that where minor provisions of an act giving certain powers to officers elected, or appointed thereunder, are unconstitutional, that the whole act is null and void.

Let us suppose for a moment that the village law had given to the village the right to establish works of its own, or to condemn the existing plant, but that the proceedings authorized for the latter purpose were expressed in such terms as to deprive the water company of its property without due process of law, and unconstitutional for that reason, and that the water company had successfully resisted an attempt to condemn its property under the act, could the water company then maintain an action restraining the village from establishing works of its own upon the ground that the tax payers would not have voted for municipal ownership, unless they had believed that the village had power to condemn the existing plant?

The electors of the City of Syracuse voted for municipal ownership of the water system under an act, Chap. 61, Laws of 1886, which authorized condemnation proceedings against persons owning certain properties. The power to condemn their property was resisted by the owners upon the ground that the same was unconstitutional. (Case on appeal, 86 Hun. 441.) If it had been so held, could the old water company in the City of Syracuse have maintained an action restraining the establishment of water works by the city upon the ground that the electors would not have voted for municipal ownership had they not believed that the condemnation proceedings against such property authorized by the act were valid?

Whether the tax payers of the village of Skaneateles in voting that the village should establish a water system of its own were influenced in any manner by the provisions for the taxation of the property of the plaintiff in the act of 1875, and the frontage tax authorized, but not required, by subsequent acts, is purely imaginary and speculative.

In order that a minor provision of an act, under which an election is required to be held, which turns out to be unconstitutional and void may affect the remainder of the act, or the result of the election, it must at least, *affirmatively* appear that the voters were influenced by such unconstitutional provision. Where the provision is wholly minor to the main purpose of the act and easily separable thereform, the other provisions of the law are not rendered unconstitutional, even though evidence was given that such unconstitutional provision influenced *some* of the votes cast at the election.

POINT

IX.

SECTION 22, OF CHAPTER 181, OF THE LAWS OF 1875, DOES NOT REQUIRE THE VILLAGE TO ACQUIRE THE PROPERTY OF A WATER CORPORATION EXISTING THEREIN, BEFORE ESTABLISHING A PLANT OF ITS OWN, OR EVIDENCE AN INTENT ON THE PART OF THE LEGISLATURE THAT A VILLAGE WHICH HAS GRANTED A FRANCHISE TO A WATER CORPORATION SHALL BE HELD TO HAVE ELECTED TO TAKE WATER FROM THAT CORPORATION FOREVER.

The act authorizes condemnation of *property* and franchises, and the commissioners might very properly determine it was necessary to acquire the existing plant rather than tear up the streets again, irrespective of any franchise the water corporation might have. The word "necessary" in this act was intended to have the same signification as the word "desirable."

But if appellant's construction of that section be correct, it does not follow that the legislature thereby recognized, or contemplated, that the property of water corporations, holding franchises like the plaintiff, must be condemned before the village could construct works of its own, but only that where there were corporations holding exclusive rights, or claiming to do so, the commissioners might condemn the same if they thought it was *necessary* or *desirable*.

Sections 221 and 222 of the present village law (Chap. 414 of the Laws of 1897) shows that such intent of the legislature, deduced by the appellant from the act of 1875, does not exist, because the water commissioners of the village are *now* authorized to construct works, or condemn the property of an existing private system, without any restrictions, when authorized by a vote of the electors. The legislature has evidently *ceased* to recognize the pretended rights claimed by the appellant.

The appellant further contends that the power to establish water works of their own was conferred upon villages to enable them to perform a public duty, and not to carry on business at a profit.

The greater part of the public duty, however, was to furnish to consumers a better supply of water, and at lower rates than has been done by private corporations.

The woes of water corporations have not arisen from socialistic ideas, or the rapacity of tax payers, but from the insufficient manner in which they have exercised the powers conferred by their franchises, the exorbitant demands made for water, and the greed of their officers and stockholders.

Thus in the Syracuse case it was poor water and demand for the payment by the city of double the amount previously paid annually, which caused the action of the city. In the Warsaw and Canandaigua cases, it was the poor supply of water furnished. In the present case it was the *illegal* and *exorbitant* demands of the corporation.

It is certainly a new idea that a gas, or water company who invariably give as little as they can, and charge as much as they dare, are entitled to be treated with all the favors of purely charitable corporations. It is the general belief that municipalities are constantly suffering at the hands of corporations to whom they have given franchises without sufficient restrictions, and prominent among such corporations are gas and water companies, street and steam railways.

The suggestions scattered through appellant's brief that the water corporation has built up a demand for water and created a water business which did not before exist, apply with equal force to a franchise granted to another corporation. It cannot be said that the defendant village in this case takes the property, business or franchise of the plaintiff. It only becomes a competitor. The only objection to that suggestion is that the taxation authorized by Sec. 230 of the Laws of 1897, has the indirect effect to destroy competition, all former laws on the subject being repealed by that act. That section may be declared unconstitutional and void, if it is a violation of the exercise of the power of taxation vested in the legislature without affect-ing the act of 1875.

POINT

X.

CHAPTER 369, OF THE LAWS OF 1889, IS FURTHER EVIDENCE THAT IT WAS NOT THE INTENTION OF THE LEGISLATURE, THAT VILLAGES BY GRANTING APPLICATIONS TO SUPPLY WATER TO CORPORATIONS UNDER THE WATER COMPANIES LAW SHOULD BE HELD TO HAVE BOUND THEMSELVES TO TAKE WATER FROM SUCH CORPORATION FOREVER.

That act amends Chap. 737, of the Laws of 1873, authorizing the formation of water companies, and subsequent acts supplementary thereof.

It provides that it shall be the duty of corporations formed under that act to supply villages where they are organized and their inhabitants with water, when *requested* to do so.

POINT

XI.

THE CONTRACT MADE BY THE TRUSTEES OF THE VILLAGE IN 1889 FOR A SUPPLY OF WATER WAS ILLEGAL AND NO RIGHT COULD BE ACQUIRED BY THE PLAINTIFF THEREUNDER.

In the Pennsylvania cases, it was held that the election of the village was determined by the *contract*.

and not by the previous *franchise*.

At the time this contract was made, the only power the trustees had was by virtue of Chap. 129, of the Laws of 1879, authorizing the trustees of a village to contract with any water company for supplying the village with water for the purpose of extinguishing fires, and providing that no such contract should be made for a longer period than five years, nor for a sum exceeding in the aggregate fifty cents per capita per annum of the population of the village, unless the proposition for the same be submitted at an annual election, or special election, to a vote of the citizens authorized to vote on questions of taxation, and approved by a majority of the same.

The contract entered into between the plaintiff and trustees required the village to pay thirty dollars per annum for forty hydrants, or $1,200 a year (fol. 398.) There was no vote authorizing the contract, but on the contrary a large number of the tax payers remonstrated against it. At that time the Village of Skaneateles contained less than 2000 inhabitants and only a contract for $1,000 or less was legal (fol. 522.) The population of the Village of Skaneateles in 1880 was 1669, and in 1890 only 1559 (Red Book, 1898, page 522.) This census was not put in evidence, but the court may take judicial notice of the population of political divisions of the state.

Mertz vs. City of Brooklyn,
33 St. Rep., 577, not reported elsewhere.

The trustees therefore made a contract requiring the village to pay nearly double the amount they were allowed to do by law. The plaintiff could acquire no equitable rights from any implied obligation resulting from this contract.

It is claimed by the appellant that the trustees were given the power to make the contract made by them, by Chap. 422, of the Laws of 1885, but effect may be given to that law and leave the act of 1879 in force.

Sutherland on Statutory Cons.,

Section 152.

In the Matter of the Evergreens,

47 N. Y., 216.

That it was not the intention by chapter 422 of the Laws of 1885 to give further powers to the trustees of villages incorporated under the general village law, is evidenced by Chap. 978 of the Laws of 1896, substantially re-enacting Chap. 129 of the Laws of 1879, and repealing all acts inconsistent therewith.

POINT

XII.

THE PLAINTIFF IS NOT ENTITLED TO TAKE WATER FROM SKANEATELES LAKE!

If such is the case this action cannot be maintained on the ground that the defendants have in any manner violated plaintiff's legal rights.

By plaintiff's franchise they are required to supply water from the lake. By the act under which they are incorporated they are *forbidden* to do so. Chap. 737, of the Laws of 1873, Sec. 3, authorizes the companies therein to have, hold and occupy any of the waters of the State, provided that said companies shall have no power to take or use water from any of the canals of this State, or any canal reservoirs *as* feeders, or any streams which have been taken by the State for the purpose of supplying the canals with water. It is quite evident that the words "as feeders" should read "or feeders," and that the intention of the legislature was to prevent corporations formed under that act from taking any water from a reservoir, *or feeder* of the canal.

The plaintiff produced no authority for its right to take water except a license of the Superintendent of Public Works, which was granted without consideration and is by its terms revocable at any time.

It is submitted that this is not sufficient, as it affirmatively appears in the case, that there was no resolution of the canal board authorizing the granting of such license.

Folio 295.

Skaneateles Lake is a reservoir or feeder of the canal.

Folios 164—188.

That a statute, which is unconstitutional so far as it purports to operate retrospectively, may be upheld as to future cases, is settled by authority.

People vs. O'Neil,
109 N. Y., 251.
Cooley Const. Lim.,
180.
162 N. Y., 48.

The Court says in that case at page 49: "The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare; * * * * * This unlimited right of the State to charge, or to authorize others to charge toll, freight or fare for transportation on its roads, canals, &c., arises from the simple fact that they are its own works, or constructed under its authority: it gives them being."

The same rule applies to a water company, they are the creature of the legislature, and when this body passes a law which directly or indirectly changes or modifies its powers, it cannot be said that a company organized after the passage of these acts, even though they impair the obligation of a company organized prior to the passage, that a company organized after its passage has a right to assail its validity.

162 N. Y., 49.

110 N. Y., 548 N. G.

72 N. Y., 216 N. G.

The Court says in People vs. O'Neil, 109 N. Y., 262: "If it was a law governing future cases only, and even if it purported to enact a rule applicable to past as well as future transactions, it would be void as to the former only. The cases are separable, and it is not the rule that the whole statute falls because one part is unconstitutional and void, unless the void part is so interwoven with the valid part that the parts cannot be separated and the valid part sustained by itself, without defeating the intention of the legislature."

This is precisely the rule held by the Court below in this case; we have here the Court holding that the frontage tax was unconstitutional, and taking that out, we have remaining what was the law prior to the organization of the plaintiff, and under the law as laid down in the cases cited the plaintiff cannot assail the same.

POINT

XIII.

THE PLAINTIFF IS NOT ENTITLED TO ANY RELIEF, BECAUSE IT WAS INCORPORATED LONG AFTER THE VILLAGE LAW OF 1875 WAS ADOPTED.

The plaintiff claims relief of a Court of Equity on the grounds that by reason of the competition arising from the establishment of water works by the village, that said act of 1875, Chapter 181, is unconstitutional, because it authorizes the taking of private property for public use without just compensation; because it violates that provision of the constitution which declares that no person shall be deprived of property without due process of law; because it denies to a person within its jurisdiction the equal protection of the laws.

The plaintiff is not a natural person, but a corporation created in the year 1887 under the Water Company's Act, being Chapter 737 of the Laws of 1873. By said chapter 181 of the Laws of 1875, villages were authorized to establish water works of their own, or condemn existing plants. By chapter 129 of the Laws of 1879, amending said chapter 181, the trustees of a village were authorized to contract for a water supply

(with any water company,) provided said contract should not be made for a longer period than five years, unless approved by a majority of the persons entitled to vote on such questions. By chapter 422 of the Laws of 1885, amending the Water Company's Act of 1873, corporations formed thereunder were required and empowered to supply water to villages where they were organized, and it was provided that the Board of Trustees of a village might enter into a contract for a supply of water with such corporation for a period not exceeding five years, unless approved by the electors of the village.

All these acts were in existence at the time the plaintiff corporation was formed, and it asked for and obtained its franchise subject to the provisions of these acts.

A statute is not unconstitutional because it authorizes the taking of private property without just compensation, or deprives a person of property without due process of law, when the person is a corporation created after the statute is passed, and the only effect of the statute is to create a *competitor* in the business to be conducted by the corporation.

If it should be conceded that the act of 1875, for the reasons suggested by the plaintiff, was unconstitutional as to corporations *existing* at the time of its passage, it does not have that effect as to a corporation organized *after* such law was enacted.

Ashley v Ryan
156 U S 443

109 N. Y., 251.

162 N. Y., 48.

A statute cannot be said to be unconstitutional because by virtue thereof private property is taken without just compensation when the corporation is created after the passage of such statute, nor can a corporation be considered to be deprived of property without due process of law when the statute was in existence at the time that the corporation was formed. For the same reason, it cannot be said that the statute denies to a person within its jurisdiction the equal protection of the laws.

The parties interested were not obliged to form the corporation in question. When they did so, they organized subject to the limitations prescribed by the various statutes of this state and the privileges and powers granted thereby, and any competition in its business that might arise under and by virtue of such statutes. The act of 1875, and the subsequent acts granting powers to villages to establish works of their own, may be considered as amendments to the Water Company's Act of 1873. Whatever effect such amendments might have as to a corporation formed before the passage thereof, they cannot be said to violate any constitutional provisions as to corporations formed after their passage.

The plaintiff could not form a corporation under the Water Company's Act, and then say that some prior statute deprived him of property, which it had acquired subsequent to the passage of such statute.

The parties interested were not obliged to form the water corporation in question. When they chose to do so, they became subject to the provisions of law that the village might, if it saw fit, establish works of its own.

The sole ground upon which it is claimed the constitutional provisions in question have been violated is, that *previous* to the time the corporation was formed, an act had been passed authorizing villages to enter into competition with companies formed under the act of 1873. When the plaintiff corporation was organized, it entered on its business subject to this contingency authorized by statute, and it was one of the risks of the speculation entered into for the purpose of making money. It was a risk of the trade which they voluntarily took and assumed.

This point, through inadvertence, was not presented to the Court of Appeals.

POINT

XIV.

THE PROVISION FOR POSSIBLE TAXATION OF THE PROPERTY OF THE EXISTING WATER CORPORATION CONTAINED IN CHAPTER 181 OF THE LAWS OF 1875 DO NOT RENDER UNCONSTITUTIONAL THAT PORTION OF THE ACT AUTHORIZING A VILLAGE TO ESTABLISH WATER WORKS OF ITS OWN.

They cannot be held to have that effect upon the *imaginary theory*, "that they form a weapon which is a standing menace impairing the value of the property of the plaintiff subjected to it." It cannot be said with any show of reason that the plaintiff will ever lose a customer, or fail to acquire one, on account thereof. Nor can it be said that a provision of law, which is unconstitutional, and cannot be enforced for that reason, *impairs* the value of the property affected thereby. The right granted to the village to establish works of its own, decided by the Court below in its favor, the alleged illegality of which the plaintiff does not claim has been overlooked by the Court, is equally a continuing menace *impairing* the value of the plaintiffs' property.

An act is not unconstitutional because it may have the effect to impair the value of *property*, if the powers granted thereby should ever be *exercised*, but only where it impairs the obligation of a *contract*, *takes property* for public use without just compensation, or *deprives* a party of property without due process of law, etc. Thus, where a franchise is granted by a state to one corporation, the granting of a similar franchise to another corporation in the same locality necessarily impairs the *value* of the property of the first corporation, and it is a standing menace to its prosperity. And it is not perceptible how that *power* to tax property, which never has been, or is likely to be exercised, can impair its value or deprive a party of his property without due process of law.

It cannot be held as a matter of law, or fact, that any tax-payer of the Village of Skaneateles has been, or would probably be influenced in casting his vote by the fact, that under the act of 1875, in case of a deficiency in the sums received by the village for water, the amount of the same might be assessed against the plaintiff, as well as other parties owning real estate in the village.

There is no evidence in the case that any voter was so influenced.

The burden of proof is upon the plaintiff. The Court must assume that the unconstitutional provisions of the act have not affected the result of the election, unless such proof is made.

People vs. Kinney,

96 N. Y., 294.

People ex rel. Fowler vs. Bull,

46 N. Y., 57.

People ex rel. City of Rochester vs. Briggs,

50 id., 553.

Commonwealth vs. Kimball,

24 Pick., 362.

Maize vs. the State,

4 Ind., 342.

Willard vs. People,

4 Scam. (Ill.) 461.

Mayor, etc. vs. Dechert,

32 Md., 369.

The assessment of taxes upon the property of the water corporation for general purposes, while all the property of the village, including its water plant, remains exempt therefrom, is not a taking of the property of the plaintiff without just compensation, or due process of law, nor is it a denial to the plaintiff of the equal protection of the laws.

People vs. Mayor,

4 Com., 419, 424.

People vs. Lawrence,

41 N. Y., 140.

The act of 1875 does not of itself direct the imposition of any tax upon the property of the plaintiff, but only provides that under certain contingencies such tax shall be assessed. Until they *arise* and such tax is *assessed*, the plaintiff is not entitled to relief upon the ground that the provisions of the act authorizing a tax upon its property are unconstitutional. If such tax is actually levied under the law of 1875, or 1894, the plaintiff is not entitled to an injunction restraining the defendant village from establishing its water works, but only to an injunction restraining the collection of the tax from its property, and perhaps under the law of 1894, restraining the collection of the tax from the property of any of the individuals assessed thereunder. This precise question was decided in the Warsaw case, argued with this case in the Court below.

161 N. Y., 176.

POINT

XV.

THE SUBSEQUENT ACTS OF THE LEGISLATURE KNOWN AS CHAP. 507 OF THE LAWS OF 1899, AND CHAP. 662 OF THE LAWS OF 1893, AND CHAP. 284 OF THE LAWS OF 1894, AMENDING SAID ACT OF 1889, DO NOT RENDER THE PROVISIONS OF THE ACT OF 1875 AUTHORIZING VILLAGES TO ESTABLISH THEIR OWN WATER PLANTS UNCONSTITUTIONAL AND VOID.

These subsequent acts are *independent* acts, and do not purport to be amendments to the act of 1875, nor are they added as sections thereto. They are not incorporated with the acts of 1875, so as to affect the constitutionality of its other provisions. They simply confer certain powers of taxation upon water commissioners of villages to be exercised, or *not*, as they deem fit.

In villages where there is no existing water plant in competition with the municipality, the exercise of such power is not forbidden by the constitution.

These acts do not form an ingenious device to deprive existing water corporations of their customers, but were passed to enable municipalities where there are no private plants to levy a frontage tax on all the real estate benefited by the water supply. These provisions have come from the special charters of different cities and villages of the state, where water is furnished by the municipality alone, and there is no competing company.

In spite of the somewhat harsh suggestion of the Court, that a village that would refuse to condemn an existing plant would not hesitate to impose a frontage tax to drive the competing water corporation out of existence, the village of Skaneateles has never assessed, or proposed to assess, such frontage tax. It may have been left by the legislature *discretionary* with the water commissioners to impose such tax, so that in case of villages where there were existing water corporations it should not be levied.

If the subsequent acts were unconstitutional because they dealt with a subject not contained in their title, could it be for a moment claimed that the prior act of 1875 was rendered void thereby?

As stated under the foregoing point, a power of taxation granted by a statute which is unconstitutional, where the exercise of such power is discretionary, does not of *itself* impair the value of property subject to taxation thereby. It is only the *exercise* of such power that constitutes a taking of property for public use without just compensation, or due process of law, and when such exercise is attempted, it may be restrained in suits brought by those who would be injured thereby.

Where powers of taxation conferred upon municipal authorities by general statutes cannot be lawfully exercised in the case of a *certain* municipality because of the circumstances existing therein, but the same are easily separable from the main provisions of the act to which they are a subsequent independent enactment, and the exercise of such powers is made discretionary with such authorities, it can not be said that a voter under the original act is influenced by his ignorance that such powers are unconstitutional. When he casts his vote, whether the provisions in question are constitutional or not, he knows the same may never be exercised, and his vote is not affected by the power, or want of power to exercise the same, when such exercise is optional.

The Court cannot assume that the elector was induced to vote for water taxes by the Law of 1894. The plaintiff must prove that such was the fact to take advantage of it.

People vs. Kinney,

96 N. Y., 294.

The point is not whether the provisions of a statute which are adjudged to be unconstitutional are contained in the same section, for the distribution of sections is purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

Cooley on Const. Lim.,

p. 178.

When part of a statute is unconstitutional this does not affect the validity of the remainder, unless the provisions are so interdependent that one can not operate without the other, or are so related, in substance and object, that it is impossible to suppose that the legislature would have passed the one without the other.

If when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, it must be retained and this is so although the portion to be condemned is found in the *same section* with that sought to be retained.

People vs. Kinney,

96 N. Y., 294.

People vs. Kelly,

76 N. Y., 475.

People vs. Durston,

119 N. Y., 572.

The cases cited seem directly in point. In the first case an act for the election of aldermen in the City of New York contained a provision prohibiting the electors from voting for more than two-thirds of the whole number to be elected. An action of *quo warranto* was brought to test the title of the aldermen elected under the act, claiming that this provision was unconstitutional. The Court held that it was void for that reason, but that the aldermen were duly elected because it did not appear that any voter *claimed* the right to vote for all the six aldermen, and was *denied* that right.

It would be a most dangerous doctrine to establish, that where minor provisions of an act giving certain powers to officers elected, or appointed thereunder, are unconstitutional, that the whole act is null and void.

Let us suppose for a moment that the village law had given to the village the right to establish works of its own, or to condemn the existing plant, but that the proceedings authorized for the latter purpose were expressed in such terms as to deprive the water company of its property without due process of law, and unconstitutional for that reason, and that the water company had successfully resisted an attempt to condemn its property under the act, could the water company then maintain an action restraining the village from establishing works of its own upon the ground that the taxpayers would not have voted for municipal ownership, unless they had believed that the village had power to condemn the existing plant?

The electors of the City of Syracuse voted for municipal ownership of the water system under an act, Chap. 61, Laws of 1886, which authorized condemnation proceedings against persons owning certain properties. The power to condemn their property was resisted by the owners upon the ground that the same was unconstitutional. (Case on appeal, 86 Hun, 441.) If it had been so held, could the old water company in the City of Syracuse have maintained an action restraining the establishment of water works by the city upon the ground that the electors would not have voted for municipal ownership had they not believed that the condemnation proceedings against such property authorized by the action were valid?

Whether the taxpayers of the Village of Skaneateles in voting that the village should establish a water system of its own were influenced in any manner by the provisions for the taxation of the property of the plaintiff in the act of 1875, and the frontage tax authorized, but not required, by subsequent acts, is purely imaginary and speculative.

In order that a minor provision of an act, under which an election is required to be held, which turns out to be unconstitutional and void may affect the remainder of the act, or the result of the election, it must at least *affirmatively* appear that the voters were influenced by such unconstitutional provision. Where the provision is wholly minor to the main purpose of the act and easily separable therefrom, the other provisions of the law are not rendered unconstitutional, even though evidence was given that such unconstitutional provision influenced *some* of the votes cast at the election.

POINT

XVI.

The following are statements of statutes of the State of New York referred to in the briefs of counsel, or the material parts of the same.

The general village law and its amendments, under which the Village of Skaneateles was incorporated (Chapter 291, vol. 1 of Laws of 1870, Sec. 3 and 13, Title 3,) contains the following provisions:

"The trustees shall have power * * * to construct and maintain reservoirs and systems, and supply them with water for use at fires, and to protect and preserve property at fires, prevent fires and provide for their extinguishment."

This act contains no other provisions authorizing the trustees to supply the village with water, or contract for the supply.

Chapter 181, Laws of 1875, is entitled an act to authorize the villages of the State of New York to furnish pure and wholesome water to all inhabitants thereof. Sections 1 to 16 provide for the appointment of water commissioners and authorize them to establish water works for the village, and to borrow money upon the credit of the village to pay for the same and secure such payment by issuing of bonds and obligations of indebtedness. Section 15 of said act reads:

"The entire annual receipts for water rents after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works, and of extending the same and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking funds shall be managed by said commissioners."

Section 16 reads as follows:

"In case the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any year, not be *sufficient* to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be *sufficient* to pay said principal, and also the said interest falling due that year, it shall be the duty of the board of trustees of said village, and they are hereby directed to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the same time and in the *same manner* as other expenses of said village are assessed, levied and collected, and the same shall be applied to the payment of such interest or principal, or both."

This is the section relied upon by the appellant as unconstitutional, upon the theory that it authorizes the taxation of the plaintiff's water plant to meet any deficiency arising from water receipts.

Section 22 of the same act reads as follows:

"Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall *become* or be *deemed necessary* by the Board of Water Commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty to make, or cause to be made, a thorough examination of the works, rights, privileges or properties owned or held by such corporations, or any of them, and *if such commissioners shall determine* that said works, rights, privileges and properties are necessary for the purpose of this act, they shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisement, who shall be disinterested freeholders and residents of the County."

Then follow provisions for the appraisement and award of the property taken. Then come the following words:

"The awards made to the corporation whose rights and properties are so taken, shall be paid by the water commissioners herein authorized to be created from the proceeds of bonds, certificates or other obligation which are hereby authorized to be issued by such commissioners for such purpose, and thereupon all the rights, privileges, works, franchises and properties owned by said corporation, or held by it for its purposes, shall be vested in said village."

This is the provision under which the plaintiff claims that the village was bound to condemn the property of the appellant before establishing works of its own.

Chapter 129, Laws of 1879, amending the General Village Law, provides:

"The Board of Trustees also shall have power, and is hereby authorized to contract with any water company for supplying the village with water for the purpose of extinguishing fires, and to assess and collect the amount agreed to be paid in such contract as other village taxes are assessed and collected; and any such contract entered into by the trustees of any village shall be valid and binding upon such village; provided, however, that no such contract shall be made for a longer period than *five years* nor for a sum exceeding in the aggregate fifty cents per capita, per annum, of the population of the village, unless the proposition for the same be submitted to a vote of the citizens, in the manner provided in sections 4 and 5 of this title, and approved by a majority of the voters &c."

In 1889, the Legislature passed an act, (Chapter 507), entitled "An Act to authorize villages of the State of New York to establish water rates and collect the same," reading as follows:

"Boards of water commissioners, acting under Chapter 181 of the Laws of 1875, and the acts amendatory thereto, may annually establish a scale of water rates for the use of water, also rates to be assessed upon all real property abutting on the streets where the pipes are laid. * * * Upon the completion of said assessment, the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees; upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes."

The last mentioned act was amended by Chapter 662 of the Laws of 1893, reading as follows:

"Boards of water commissioners, acting under Chapter 181 of the Laws of 1875, and acts amendatory thereof, may establish a scale of rates for the use of water, and also rates for fire protection to be assessed on all real property abutting on the mains, or within two hundred feet of the hydrants, the owners or occupants of which do not use the water for domestic or manufacturing purposes."

Then follow the provisions of the act amended for the collection of the tax in the same manner as other taxes.

Chapter 284 of the Laws of 1894 amends said law of 1879, reading as follows:

"Boards of water commissioners, acting under chapter 181 of the Laws of 1875, and acts amendatory thereof, may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic or manufacturing purposes."

Then follow the provisions of the original act that the amounts assessed shall be collected in the same manner as other taxes.

In 1897 the Legislature passed an act, (Chap. 414) entitled "An act in relation to villages, constituting Chapter 21 of the 'general laws' and repealing the existing Village Law, providing as follows:

Sec. 220. "Contracts for water supply—The board of water commissioners may contract, in the name of the village, with an individual or corporation, for supplying water to the village for extinguishing fires or for other public purposes; but such contract shall not be made for a longer period than five years, nor at an expense for each fiscal year exceeding two and a half mills on every dollar of the taxable property of the village as appears on the last preceding village assessment roll, unless authorized at a village election."

Section 221. "Election for water works—A proposition may be submitted at a village election for the establishment of a system of water works for supplying the village and its inhabitants with water, or for the acquisition of an existing private system, at an expense in either case not exceeding the sum stated in the proposition."

Section 222. "Acquisition of existing system—If a proposition be adopted for the acquisition of an existing system of water works, the board of water commissioners may purchase the same at a price not exceeding the sum specified therein."

Section 230. "Assessment for fire protection—A building and the lot upon which it stands, in or on *which water from the water works is not used, situated* within five hundred feet of a hydrant, may be assessed by the board of water commissioners for fire protection. * * * Upon the completion of the assessment, the board shall make a certificate thereof and deliver the same to the village treasurer. The treasurer may receive such assessments for thirty days without fee; after that time an action may be brought to recover the assessment, or a special warrant may be issued therefor, or the amount may be included in the next annual tax levy."

The plaintiff was incorporated under the Water Companies' Act, Chapter 737 of the Laws of 1873. Section 2 of that act as amended by Chapter 171 of the Laws of 1877, reads as follows:

"Whenever any persons to the number of seven or more shall organize for the purpose of forming a water works company in any of the towns or villages of this state, they shall present to the town or village authorities *an application*, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes or other sources, and their locations, from which water is to be supplied. * * * Upon the presentation of such application, the authorities of any town or village * * * shall determine by a vote of a majority of the authorities of said town or village, *whether said application shall be granted;* and the authorities of any town or village in this state are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the *persons making such application*, or either of them. * * * The persons named in such application shall thereupon meet and organize as a water works company, under such corporate name as they may select."

Section 4. "Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted."

Section 5 of the Act of 1873, as amended by Chapter 422 of the Laws of 1885, reads as follows:

"It shall be the *duty* of said corporation and they are *authorized* and *empowered* to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at reasonable rates and cost to all consumers who may use the same, and the board of trustees of any incorporated village of this state, shall have the *power*, and they are hereby authorized and empowered to *contract* for a term of *one year or more* with any water company organized under the laws of this state, for the delivery by said company of water, through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes; and the amount of such contract agreed to be paid shall be annually raised as a part of the expenses of such village, and shall be levied, assessed and collected in the same manner as other expenses of such village are raised, and when collected shall be kept separate from other funds of said village, and shall be paid over to such water commissioners by such trustees according to the terms and conditions of any such contract, and any such contract entered into by the board of trustees of any village shall be valid and binding upon such village, providing, however, that no such contract shall be made for a *longer period than five years*, nor for a sum exceeding in the aggregate two and one-half mills for every dollar of the taxable property of said village per annum, unless the proposition for the same be submitted to a vote of the electors of such village, in the manner provided by sections four and five of title four of chapter 270 * * * and any board of trustees, when so authorized, may contract for a term not exceeding *thirty years*.

Section 3 of the Laws of 1873, is amended by this act so as to read as follows:

"*Any corporation* organized under any law of this state or which may hereafter be so organized for the purpose of supplying any city, town or village with pure and wholesome water, shall have the power to enter into a contract with any other town or village, or the authorities thereof, in the county in which it shall have organized, or in any adjoining county for the purpose of supplying such town or village, or the inhabitants thereof, with pure and wholesome water, and said contract so made shall be as valid and binding, and of the like force and effect as if the said company had duly organized for said purpose, in such town or village."

Section 80 and 81 of the Transportation Corporation Law as amended by Chapter 566 of the Laws of 1892, reads as follows:

"Article VI, Water Works Corporation. Sec. 80. Incorporation—Seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided * * * the name of the cities, towns and villages which it is proposed to supply with water; that the permit of the authorities of such cities, towns and villages herein required has been granted."

Section 81. "Must supply water; village trustees or city officials may contract for same; tax therefor. Every such corporation shall supply the authorities or inhabitants of any city, town or village where they have organized with pure and wholesome water at reasonable rates and cost to all consumers who may use the same, and the board of trustees of any incorporated village, and the water commissioners or other board of officials performing the duties of water commissioners and having charge of the water supplies of any city of this state shall have power to contract for the term of one *year or more* with any such corporation for the delivery by it to the village or city of water, through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes, * * * but no such contract shall be made for a longer period than *ten years*, nor for a sum exceeding in the aggregate two and one-half mills for every dollar of the taxable property of such village or city per annum, unless a resolution authorizing the same has been submitted to a vote of the electors of the village or city * * * and any board of trustees or board of water commissioners, or other city officials, when so authorized, may make such a contract for a term not exceeding *thirty years*, and the amount of such contract shall be paid in semi-annual installments."

Also Chap 369 Laws 1889

POINT

XVII.

The judgment of the Court of Appeals of the State of New York should be sustained with costs.

M. F. Dillon,
Attorney for Defendants in Error,
Skaneateles, N. Y.
William G. Tracy,
of Counsel,
Syracuse, N. Y.

Supreme Court of the United States.

No. 134.—October Term, 1901.

The Skaneateles Waterworks Company, Plaintiffs in Error, *vs.* The Village of Skaneateles, E. Norman Leslie, as President of said Village, et al.	In error to the Supreme Court of the State of New York.

[March 3, 1902.]

This is a writ of error to the Supreme Court of the State of New York, the record having been remitted to that court from the Court of Appeals after the hearing of an appeal to the latter court and an affirmance by it of the judgment appealed from. (161 N. Y. 154.)

The action was brought by the water company to restrain the village of Skaneateles and the individual defendants, its officers, from proceeding further with the construction of a waterworks system, or from doing any thing in furtherance of the construction or operation of any system of waterworks for that village. The plaintiff claimed that the village ordinance under which the proposed action on the part of the village was taken was void as impairing the obligation of a contract between plaintiff and the village; also, that its action if continued would result in the taking of plaintiff's property without due process of law; that the action of the defendant, if permitted, would result in the taking of private property for public use without compensation; and that such legislation denied to plaintiff the equal protection of the laws.

The defendants answered denying the contentions of plaintiff, and the case was referred to a referee for trial, who, after hearing the parties, reported that the defendants were entitled to judgment, dismissing the complaint upon the merits, with costs, and judgment was thereupon entered which was affirmed by the appellate division of the Supreme Court of the State and upon appeal by the Court of Appeals.

As matters of fact the referee in his report found that the plaintiff was a domestic corporation organized under the act of 1873, chapter 737, and the several acts amendatory thereof; that the village of Skaneateles was a municipal corporation and the individual defendants were respectively the president, water commissioners and trustees of the village. On April 5, 1887, the village granted a franchise to the plaintiff to maintain and operate within the village of Skaneateles a system of waterworks for furnishing the village and its inhabitants pure and wholesome water upon the terms and conditions stated in the franchise. The plaintiff constructed the waterworks under this franchise and completed it about the year 1889 and put the same in operation; that the system was a complete and adequate one, no complaint having been made that the water furnished by the plaintiff was not pure and wholesome, or that it had been inadequate for the purposes for which the system was erected. Prior to this time the village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own; that since its incorporation, and for the purpose of carrying on its works, the plaintiff had incumbered its property by mortgages to secure the payment of bonds issued by it, which bonds were outstanding at the time of the trial. After the erection and completion of the waterworks and on February 1, 1891, the plaintiff and defendants entered into a contract for the supply of water and the erection of hydrants and for the payment of certain compensation therefor by the defendants; that such contract was limited by its terms to the period of five years from February 1, 1891, and that it has not been renewed since the time of its expiration on February 1, 1896; that after such time, without any proceeding to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant Leslie, as president of the village, appointed some of the other defendants to be water commissioners of the village, having in contemplation the purpose of constructing for said village a waterworks system of its own; that the persons so appointed commissioners entered upon the performance of their duties, called a meeting of the electors of the village, who voted in favor of municipal ownership of the waterworks, and after such election the water commissioners issued or caused to be issued bonds of the village to the amount of $30,000, which they sold for the purpose of obtaining money to construct a waterworks system of its own; that the board of water commissioners of the village have entered into a contract for the construction of waterworks for said village, and have expended thereon about the sum of $24,000, and the works are substantially completed; that all of the proceedings were taken without instituting any proceeding to condemn the property of the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property; that the works of the plaintiff were constructed at large expense and its property rights and franchise mortgaged to secure its bonds which had been issued, and the income of the plaintiff from the operation of its plant had been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the village of Skaneateles.

As conclusions of law the referee held:

(1) That the village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a waterworks system for the use of the village.

(2) That the consent of the village of Skaneateles to the organization of the plaintiff as a waterworks company, and the making of a contract by the village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within the said village, or the village from constructing and maintaining a waterworks system to supply itself with water.

(3) That subsequently to February 1, 1896, no contractual relations existed between the plaintiff and the village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff; but was entitled to construct and maintain a waterworks system of its own.

(4) That the defendants were entitled to judgment dismissing the complaint upon the merits with costs, and judgment was ordered accordingly.

Though not, perhaps, material upon the legal rights of the parties, yet it is seen from correspondence found in the record that prior to the expiration of the contract in February, 1896, the company gave notice to the village that it intended to increase its rents for hydrants, &c., to fifty dollars, which sum was ten dollars per hydrant more than it was entitled to under the franchise granted it, and twenty dollars more than the sum named in the expiring contract. The village authorities refused to pay the increase, and the water company, on learning it had under its franchise the right to charge but forty dollars per hydrant, reduced its demand, but the parties failed to agree, and the contract expired. After its expiration the company notified the village that the hydrants had been closed and that there must be no interference with them, even in case of fire. Both parties became somewhat excited, it would seem, and it resulted in the village taking proceedings under chapter 181 of the laws of 1875, and its amendments for erecting and operating waterworks of its own.

Mr. Justice Peckham, after making the above statment of facts, delivered the opinion of the Court.

The power of this court to review the judgment of the New York Court of Appeals is limited to a consideration of the question whether any right of the plaintiff's protected by the Federal Constitution has been denied by the judgment. Whether the plaintiff is entitled to relief under the facts disclosed in the record upon general principles of equitable jurisdiction, is not a matter for us to inquire into so long as the question does not involve the constitutional rights of the plaintiff.

The claim is made that the ordinance adopted by the authorities of the village of Skaneateles in 1896, providing in substance for the erection and operation of a water system by the village, which ordinance was passed pursuant to an authority of the legislature under the act, chapter 181 of the laws of 1875, and amendments, (giving authority to cities and villages to build their own waterworks,) impaired the obligations of the contract existing between the village and the company. The contract to which reference is made is not the one which was entered into in 1891 between these parties for the term of five years, because that contract was fully carried out and had expired by its own limitation in February, 1896, but it is the contract which the plaintiff in error claims was implied by reason of its organization and incorporation in 1887, in pursuance of an application made to, and with the consent of, the village authorities, and under the provisions of chapter 737 of the laws of New York of 1873, and the acts amendatory thereof. It is said the village at the time of plaintiff's incorporation had the election to do the work itself under the above act of 1875, or to confer upon a private company like the plaintiff, under the act of 1873, the right to do it, and when with these two different methods for obtaining a supply of water the village chose that which called for a supply by a private company, it impliedly contracted that it would not itself thereafter take the other method for obtaining such supply, unless it bought the plant of the company or condemned it under the provisions of the act of 1875. This, it is said, was implied in the grant made by the village. Sections, 1, 2, 3, 4 and 5 of the act of 1873, under which the plaintiff was incorporated, are set forth in the margin.*

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* CHAP. 737, LAWS OF 1873.

SEC. 1. Any number of persons not less than seven may hereafter organize in any town or village of this State a waterworks company, under the provisions of this act.

SEC. 2. Whenever any persons to the number of seven or more shall organize for the purpose of forming a waterworks company in any of the towns or villages in this State, they shall present to the town or village authorities an application, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes or other sources and their locations, from which water is to be supplied. Such applications shall be signed by the persons who propose to form said company, and shall contain a request that the said town or village authorities shall consider the application of said company to supply said town or village of this State, or the inhabitants thereof, with pure and wholesome water. Upon the presentation of such application, the authorities of any town or village, which authorities are for the purposes of this act defined to consist for incorporated villages and towns, the board of trustees and supervisor, and for all other towns, the supervisor, justices of the peace, town

Under the act of 1875, chap. 181, the village was authorized to erect and operate its own works. Provision was made in the act in detail for the organization of a board of water commissioners and the building of waterworks, the mode of paying for the same, and other matters connected with the supply of water. That part of the twenty-second section of the

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clerk and commissioner of highways. Said authorities shall within thirty days of the presentation of said application determine by a vote of a majority of the authorities of said town or village, whether said application shall be granted; and the authorities of any town or village in this State are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the person making such application or either of them. Duplicate certificates of such determination shall be filed in the office of the clerk of said town or village, and in the office of the county clerk of the county in which said town or village granting such application shall be situated. The persons named in such application shall thereupon meet and organize as a waterworks company under such corporate name as they may select. They shall file in the office of the secretary of State a certificate of such organization. Said certificate shall contain the name of the corporation, the names of the members of said corporation and their residences, the amount of capital stock, the location of the office of said company. Such certificate shall be subscribed and sworn to by the president of said corporation, and shall be attested by the secretary thereof. Upon the filing of said certificate said waterworks company shall be known and deemed a body corporate, and shall be capable of suing and being sued by the corporate name which they shall have selected, in any of the courts of this State. The capital stock of said company shall be paid in the manner and within the time provided by the "Act to authorize the formation of corporations for manufacturing, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the several amendments thereto, and the stockholders of said companies shall be personally liable for the debts of said companies in the same manner and to the same extent as is provided by said act and the amendments thereto.

SEC. 3. Said corporation shall have power to take and hold real estate for the purpose of their corporation, and may have, hold and occupy any of the waters of this State; provided, however, that nothing herein contained shall be deemed to infringe upon any private right which shall not have been the subject of an agreement and lease or purchase by said corporation. Provided, that said company shall have no power to take or use water from any of the canals of this State or any canal reservoirs as feeders or any streams which have been taken by the State for the purpose of supplying the canals with waters.

SEC. 4. Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered, to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted.

SEC. 5. Said corporations are authorized and empowered to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at such rates and cost to consumers as they shall agree upon.

act, in regard to the taking of the property of a private company, is set forth in the margin.*

Pursuant to the provisions of the act of 1873, certain persons on July 5, 1887, applied to the village authorities for permission to organize a water company to supply the village with pure and wholesome water, and on that day the authorities granted the request. On August 1, 1887, a certificate was duly filed in the office of the secretary of State at Albany, by which the corporation was formed under the name of The Skaneateles Waterworks Company. Subsequently to the incorporation of the plaintiff it built the waterworks and entered into a contract with the village authorities to supply water to the village for five years from February 1, 1891.

It would seem to be clear, under the decisions of this court, that the plaintiff in applying to the village and filing its certificate with the secretary of State under the act of 1873 acquired no contract right, expressed or implied, to any exclusive privilege of using the streets of the village for supplying it with water. (*Charles River Bridge Company* v. *Warren Bridge Company*, 11 Pet. 420; *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685, 696; *Walla Walla City* v. *Walla Walla Water Company*, 172 Id. 1, 13.) The Court of Appeals of New York held to the same effect in regard to a provision in the charter of Syracuse relating to the rights of a water company, the provision being similar to the charter here involved. (*Syracuse Water Company* v. *City of Syracuse*, 116 N. Y. 167, decided in 1889; also *Matter of City of Brooklyn*, 143 N. Y. 596, affirmed in this court, 166 U. S. *supra*.) Indeed, this proposition is conceded by counsel for the plaintiff, and it admits that the village, notwithstanding its grant to the plaintiff, possessed the power to grant to any other individual company the same kind of privilege it had already granted to plaintiff. But it denies the right of the village to avail itself of the authority to itself build and operate the works, given under the act of 1875, unless the plaintiff's plant be taken by purchase or condemnation.

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* PART OF SEC. 22, CHAP. 181, LAWS OF 1875.

SEC. 22. "Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or any of them, and if such commissioners shall determine that said works, rights, privileges and properties are necessary for the puposes of this act, they shall have the right to make application to the Supreme Court. . . ." The section then provides for taking the property by condemnation.

Having before it the above act of 1873, amended in 1877, the Court of Appeals, in *People ex rel. &c.* v. *Forrest and others,* (97 N. Y. 97, 100, decided in 1884,) said that: "The State authorized the formation of waterworks companies in its towns and villages, (Laws of 1877, chap. 171,) but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed."

It is true that by chapter 566 of the laws of 1890 it was provided that the water companies "shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, with pure and wholesome water at reasonable rates and cost;" and the act provided that contracts might be made therefor. But there was no provision making it incumbent upon the municipal authorities to take water from any such company.

By virtue of its incorporation under this act of 1873 the plaintiff secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff.

There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed.

It is not amiss to here recall the situation at the time plaintiff became incorporated, in 1887, under the act of 1873. That act provided for the organization and incorporation of water companies which might furnish water to cities, villages and towns of the State. There was also the act of 1875 (chapter 181) and its amendments, granting to the village authorities the right to erect and operate a water system of their own. There was the further statutory provision, (chapter 129 of the Laws of 1879, relating to the municipality, and chapter 422 of the Laws of 1885, relating to a water company,) that the contracts to be entered into between the water companies and the municipal authorities should not extend beyond five years, unless there was a vote of the electors authorizing a contract for a longer period, but in no case longer than thirty years. Now while the parties are prohibited from contracting for more than five years without a vote of the electors, which was not taken, how can it be said that when they contracted only for the time permitted by the legislature, there was nevertheless an implied contract that the village would never avail itself of the right provided by statute, without purchasing or condemning the property of the plaintiff? No such condition is stated in any statute. We cannot see any solid foundation for the claim that there was a final and conclusive election of methods by the village, out of which sprang the implied contract contended for, when the legislature at that very time prohibited a contract for more than five years. It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the method chosen by the village. After the expiration of that time we cannot see why the parties were not in the same condition as to their respective rights that they were in before the contract for the five years was made. Otherwise, we have the anomalous condition that the village may grant unconditionally, the franchise to supply it with water, to another private company, while ceasing and refusing to take from the old company, and yet it cannot erect its own water system, (unless it purchases or condemns the plant of the plaintiff,) because it chose to enter into a contract with plaintiff for a supply of water by it for five years, although the contract has expired by its own limitation and the parties are under no legal obligation to renew it. We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract never to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase. We cannot see the logic of such contention.

The very fact that the taking of the plant of a private existing company was not made a condition for the exercise of the authority to build granted the village by the act of 1875, shows there was no implied contract to take such property. The right to build was specifically given to the village under the act of 1785, whether any private company existed or not, and that right to build was nowhere in the statute conditioned upon a taking by the village of the plant of the private company. The act recognized the fact that there might be an existing private company, and the twenty-second section gave the village authority to take it, but did not compel it. It, therefore, authorized the village to build and operate its works without taking the plant of the private company. Both these acts were in existence when the plaintiff was incorporated under the act of 1873, and it took the chance of the village thereafter availing itself of the act of 1875 to build and operate, unconditionally, its own plant.

When the contract for the five years had expired we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for. The court below, after careful consideration of the statute of 1875, came to the conclusion that there was nothing in the language of the twenty-second or any other section thereof compelling the village to purchase or condemn the plant of the company, and that no contract could be implied therefrom. Chief Judge Parker, in his opinion in this case, (161 N. Y. 154, at page 162,) says:

> "On the other hand, the appellant urges that the statute authorizing villages to supply themselves with water, and permitting the acquisition of the works of any private corporation that may be supplying such municipalities with water, also makes it the duty of the water commissioners to acquire the property of the existing corporation or corporations. But after a very careful examination of the statute it seems to us very clear that this is not so. It is probable that the legislature mistakenly assumed that such authorities would not act unjustly or oppressively, but would recognize the property rights of others. Be that as it may, the right to determine whether the property of an existing waterworks corporation should be taken or not is clearly submitted to the determination of the local authorities. The refusal of the defendant, therefore, to acquire the plaintiff"s property by proceedings *in invitum* does not tend to support the plaintiff"s claim for an injunction. The defendant has done precisely what the statute authorizes, and all that remains for the court to determine is whether the act was within the legislative power, or void because in contravention of the organic law."

The judge then proceeded to discuss that question, and held that the action of the village was legal. We concur in this view. The language too plainly leaves it to the discretion and judgment of the water commissioners, to permit of any other construction. Not being bound by the statute to take the property of the plaintiff as a condition of building its own plant, there is, as we have said, no implication of a contract to do that which the statute itself does not direct.

Reference was made on the argument to two Pennsylvania cases, decided by the Supreme Court of that State. They are *White* v. *City of Meadville*, (177 Pa. St. 643,) and *Metzger* v. *Beaver Falls &c.*, (178 Id. 1.) They decide what is the proper construction to be given certain statutes of that State relating to municipal corporations, and to water companies formed to supply them with water. The actions were brought by taxpayers of the municipalities to restrain the latter from erecting works of their own to supply water. The court held that under the powers given to the municipalities by those statutes, they had not the right to erect such works unless they took the plant of the water companies then operating such plant. They did not hold there was any implied contract on the part of the municipalities that they would so take the plant, or that to operate works of their own without doing so would be a taking of the property without due process of law or without making compensation, or that it would be a denial of the equal protection of the laws. The cases were maintained on equitable principles and in favor of taxpayers who were complainants, and there was no question of contract between the city and the water company upon the basis of which the actions were permitted to stand. It was a simple question of the powers granted to the parties by the different statutes. The court said that although the city was not bound to become the owner of the works, it had no power to destroy their value by duplicating them at the expense of the taxpayers. A taxpayer was the plaintiff. The court decided no Federal question in either case. The statutes of New York are somewhat different, and the State court has come to the conclusion that under them the village was not bound to take the plant of the plaintiff. We agree in the view that there was no implied contract to take the property of plaintiff, even though the village should subsequently to the expiration of the written contract erect its own water system.

It is also plain that as there was no contract, such as is claimed by the plaintiff, the action of the village has not resulted in the taking of any of the property of the plaintiff without due process of law or without compensation. It has not taken any of the property of the plaintiff in any aspect of the case. Its action may have seriously impaired the value of the plaintiff's property, but it has taken none of it, and such decrease in value, caused by the village exercising its right to build and operate its own plant, furnishes, under the facts in this case, no foundation for the plaintiff's claim. (*Lehigh Water Company* v. *Easton*, 121 U. S. 388, 390.)

In *Pumpelly* v. *Green Bay Company*, (113 U. S. 166,) the land of the plaintiff had been overflowed by water under a claim of right under a statute, and it was held that such continuous overflow and user amounted to a taking of the plaintiff's property.

This is not such a case. The property of the plaintiff remains wholly untouched. Its value has decreased because the village no longer takes water from it, and the inhabitants will probably also take their supply from the village works, but the plaintiff's property has not been taken, as that term is understood in constitutional law. What the village ought to do in the moral aspect of the case is, of course, not a question for us to determine.

The Court of Appeals has held in this case that the provisions in the statute for the taxation of the property of the company in common with other owners of property to pay the obligations incurred in the construction of the works by the village, and all discriminating taxation of the patrons of the company are invalid. See also *Warsaw Waterworks Company* v. *Village of Warsaw*, (161 N. Y. 176.) The plaintiff is, therefore, freed from the obligations imposed by those provisions.

The views above expressed show that there was no such contract as claimed by the plaintiff, and consequently no impairment of the obligations of any contract, and there has been no taking of plaintiff's property, nor has it been denied by the State the equal protection of the laws. The judgment of the Court of Appeals of New York is right, and must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.